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A

SELECTION OF CASES

ON

THE CONFLICT OF LAWS

BY

JOSEPH HENRY BEALE, JR.

PROFESSOR OF LAW IN HARVARD UNIVERSITY

IN TWO VOLUMES

VOL. I

CAMBRIDGE

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JURISDICTION: REMEDIES

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**By JOSEPH HENRY BEALE, JR.**

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## PREFACE.

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THE topic of the Common Law upon which Judge Story has imposed the title, *The Conflict of Laws*, consists of four parts, different in origin, though closely related to one another in their practical application. *The Conflict of Laws* is first concerned with the jurisdiction of States, — the extent of their legislative and judicial power, and of the obligation and right of individuals to obey and to take advantage of the legislation of one or another State. These are questions of international law, which should properly be decided in every country in the same way. The topic is next concerned with the creation of legal rights and obligations, as a result of the sovereign action of some State; often an international matter, though the questions involved are rather questions of foreign fact than of law. The next concern of this branch of the law is the recognition and enforcement within one State of rights and obligations which have been created in another State; a question not in any sense international, but to be determined in accordance with the municipal law of the State concerned. Finally, there remains to determine the legal process by which, if at all, the foreign right shall be enforced; also obviously a municipal question.

But though the doctrines which make up the topic, *The Conflict of Laws*, are of various origin, they all form part of the Common Law of England, and have been adopted as such in the States of the American Union; they are law with us, not because they arose in international comity and usage or in municipal practice, but because they are acted upon in our courts. The name, *Private International Law*, sometimes applied to the whole topic, is therefore inadequate and misleading.

This collection of cases is the result of a seven years' experience in teaching the Conflict of Laws. The arrangement of the sub-

ject may be open to logical objections; but there seemed to be sufficient practical reason for the order adopted. Most of the cases here printed were decided in the English and American courts; but valuable cases in the British Colonial courts have also been printed. In these Colonies, as in the United States, the principles of the Conflict of Laws are of especial importance, since in them business transactions are seldom confined within State or Colonial lines.

Several foreign cases will be found in the collection. So far as the rules of law illustrated by them have their origin in international law, these cases may well be regarded as having persuasive authority in our own courts; cases involving, for instance, the limits of national jurisdiction, the validity of a foreign marriage, and the existence generally of foreign-acquired rights. On such questions the views of foreign courts should be carefully considered. It is unnecessary to point out to one familiar with the principles of the Common Law that greater weight should be given to the opinions of foreign courts, delivered in the course of actual litigation, than to the academical speculations of even the ablest authors, when not based on the authority of decided cases. On such questions as the effect, according to our own law, of the existence of a foreign-acquired right, where the problem, as has been pointed out, is one of purely municipal law, the views of foreign courts, administering a different system of law, are of absolutely no weight as authority. Where decisions of this nature have been included, the purpose has been to illustrate and emphasize the difference between the doctrines prevailing in the modern civil law and in our own law. The need of studying this difference has been shown by recent cases, notably the case of *Hilton v. Guyot*.

Most of these cases are here printed as they were given in Clunet's "*Journal du Droit International Privé*," not being reported in any official series accessible to me. For the translation of the cases I must take the responsibility. In the French decisions and others reported in the French form (for instance, the Belgian and Egyptian) I have done more than translate. The report as published does not ordinarily contain the opinion of the court, but merely the judgment, which, however, includes a full but formal recital of the facts and reasons on which the judgment is based. I have so changed the form of statement (without the slightest change otherwise) as to throw the judgment into the



form of an opinion. This has been done by omitting the formal commencement of each recital. I could not defend such a practice if the primary object of this collection were not in my opinion thereby furthered.

The cases cited in the notes by no means exhaust the authorities. The purpose has been to include in the notes only a sufficient number of well-considered cases to show the actual state of authority on each question.

I have not always indicated the omission of the reporter's statement of facts, where sufficient facts appeared in the opinion, or of the arguments of counsel. All other deviations from the original report have been indicated.

J. H. B.



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# CASES ON THE CONFLICT OF LAWS.

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## PART I. JURISDICTION.

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### CHAPTER I. LAW.

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#### SECTION I. THE EXTENT OF LEGISLATIVE POWER.

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#### REGINA *v.* KEYN.

CROWN CASE RESERVED. 1876.

[*Reported 2 Ex. D. 63, 13 Cox C. C. 403.*]

COCKBURN, C. J. The defendant has been convicted of the offence of manslaughter on the high seas, on a trial had at the Central Criminal Court, under the statute 4 & 5 Wm. IV., c. 36, s. 22, which empowers the judges sitting there to hear and determine offences "committed on the high seas and other places within the jurisdiction of the Admiralty of England." The facts were admittedly such as to warrant the conviction, if there was jurisdiction to try the defendant as amenable to English law. Being in command of a steamship, the "Franconia," and having occasion to pass the "Strathelyde," a British ship, the defendant brought his ship unnecessarily close to the latter, and then, by negligence in steering, ran into the "Strathelyde" and broke a hole in her, in consequence of which she filled with water and sank, when the deceased, whose death the accused is charged with having occasioned, being on board the "Strathelyde," was drowned.

That the negligence of which the accused was thus guilty, having resulted in the death of the deceased, amounts according to English law to manslaughter can admit of no doubt. The question is, whether the accused is amenable to our law, and whether there was jurisdiction to try him?

The legality of the conviction is contested, on the ground that the accused is a foreigner; that the "Franconia," the ship he commanded, was a foreign vessel, sailing from a foreign port, bound on a foreign voyage; that the alleged offence was committed on the high seas.

<sup>1</sup> See *Reg. v. Lopez*, 7 Cox C. C. 431; *Reg. v. Armstrong*, 13 Cox C. C. 184. — Ed

Under these circumstances, it is contended that the accused, though he may be amenable to the law of his own country, is not capable of being tried and punished by the law of England.

The facts on which this defence is based are not capable of being disputed; but a twofold answer is given on the part of the prosecution:—1st. That, although the occurrence on which the charge is founded took place on the high seas in this sense, that the place in which it happened was not within the body of a county, it occurred within three miles of the English coast; that, by the law of nations, the sea, for a space of three miles from the coast, is part of the territory of the country to which the coast belongs; that, consequently, the “*Franconia*,” at the time the offence was committed, was in English waters, and those on board were therefore subject to English law. 2ndly. That, although the negligence of which the accused was guilty occurred on board a foreign vessel, the death occasioned by such negligence took place on board a British vessel; and that, as a British vessel is in point of law to be considered British territory, the offence having been consummated by the death of the deceased in a British ship, must be considered as having been committed on British territory.

I reserve for future consideration the arguments thus advanced on the part of the Crown, and proceed, in the first instance, to consider the general question, — how far, independently of them, the accused, having been at the time the offence was committed a foreign subject, in a foreign ship, on a foreign voyage, on the high seas, is amenable to the law of England.

Now, no proposition of law can be more incontestable or more universally admitted than that, according to the general law of nations, a foreigner, though criminally responsible to the law of a nation not his own for acts done by him while within the limits of its territory, cannot be made responsible to its law for acts done beyond such limits:—

“*Leges ejusque imperii*,” says Huber de *Conflictu Legum*, citing Dig. de jurisdictione, l. ult., “*vim habent intra terminos ejusdem reipublice, omnesque ei subjectos obligant, nec ultra*.” “*Extra territorium jus dicenti impune non paretur*” is an old and well-established maxim. “No sovereignty,” says Story (*Conflict of Laws*, s. 539), “can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals.” “The power of this country,” says Dr. Lushington in the case of *The Zollverein*, 1 Sw. Adm. 96, “is to legislate for its subjects all the world over, and as to foreigners within its jurisdiction, but no further.”

This rule must, however, be taken subject to this qualification, namely, that if the legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incum-

bent on the courts of such country to give effect to such enactment, leaving it to the state to settle the question of international law with the governments of other nations. The question of express legislation will be dealt with hereafter. For the present I am dealing with the subject with reference to the general law alone.

To the general rule to which I have referred there is one exception, — that of a foreigner on board the ship of another nation. But the exception is apparent rather than real; for by the received law of every nation a ship on the high seas carries its nationality and the law of its own nation with it, and in this respect has been likened to a floating portion of the national territory. All on board, therefore, whether subjects or foreigners, are bound to obey the law of the country to which the ship belongs, as though they were actually on its territory on land, and are liable to the penalties of that law for any offence committed against it.

But they are liable to that law alone. On board a foreign ship on the high seas, the foreigner is liable to the law of the foreign ship only. It is only when a foreign ship comes into the ports or waters of another state that the ship and those on board become subject to the local law. These are the established rules of the law of nations. They have been adopted into our own municipal law, and must be taken to form part of it.

According to the general law, therefore, a foreigner who is not residing permanently or temporarily in British territory, or on board a British ship, cannot be held responsible for an infraction of the law of this country. Unless, therefore, the accused, Keyn, at the time the offence of which he has been convicted was committed, was on British territory or on board a British ship, he could not be properly brought to trial under English law, in the absence of express legislation.<sup>1</sup>

These decisions are conclusive in favor of the accused in the present case, unless the contention, on the part of the Crown, either that the place at which the occurrence, out of which the present inquiry has arisen, was, though on the high seas, yet within British waters, by reason of its having been within three miles of the English shore; or that, the death of the deceased having occurred in a British ship, the offence must be taken to have been there committed, so as in either case to give jurisdiction to the Admiralty, or the courts substituted for it, shall prevail. These questions it becomes, therefore, necessary carefully to consider.

On entering on the first, it is material to have a clear conception of what the matter in controversy is. The jurisdiction of the admiral, however largely asserted in theory in ancient times, being abandoned as untenable, it becomes necessary for the counsel for the Crown to have recourse to a doctrine of comparatively modern growth, namely, that a belt of sea, to a distance of three miles from the coast, though

<sup>1</sup> The learned Chief Justice then examined the authorities, which in his opinion denied jurisdiction to the Admiral in a case of the present sort. — Ed.

so far a portion of the high seas as to be still within the jurisdiction of the admiral, is part of the territory of the realm, so as to make a foreigner in a foreign ship, within such belt, though on a voyage to a foreign port, subject to our law, which it is clear he would not be on the high sea beyond such limit. It is necessary to keep the old assertion of jurisdiction and that of to-day essentially distinct, and it should be borne in mind that it is because all proof of the actual exercise of any jurisdiction by the admiral over foreigners in the narrow seas totally fails, that it becomes necessary to give to the three-mile zone the character of territory in order to make good the assertion of jurisdiction over the foreigner therein.

Now, it may be asserted without fear of contradiction that the position that the sea within a belt or zone of three miles from the shore, as distinguished from the rest of the open sea, forms part of the realm or territory of the Crown is a doctrine unknown to the ancient law of England, and which has never yet received the sanction of an English criminal court of justice.<sup>1</sup>

From the review of these authorities we arrive at the following results. There can be no doubt that the suggestion of Bynkershoek, that the sea surrounding the coast to the extent of cannon-range should be treated as belonging to the state owning the coast, has, with but very few exceptions, been accepted and adopted by the publicists who have followed him during the last two centuries. But it is equally clear that, in the practical application of the rule, in respect of the particular of distance, as also in the still more essential particular of the character and degree of sovereignty and dominion to be exercised, great difference of opinion and uncertainty have prevailed, and still continue to exist.

As regards distance, while the majority of authors have adhered to the three-mile zone, others, like M. Ortolan and Mr. Halleck, applying with greater consistency the principle on which the whole doctrine rests, insist on extending the distance to the modern range of cannon, — in other words doubling it. This difference of opinion may be of little practical importance in the present instance, inasmuch as the place at which the offence occurred was within the lesser distance; but it is, nevertheless, not immaterial as showing how unsettled this doctrine still is. The question of sovereignty, on the other hand, is all-important. And here we have every shade of opinion.

One set of writers, as, for instance, M. Hautefeuille, ascribe to the state territorial property and sovereignty over the three miles of sea, to the extent of the right of excluding the ships of all other nations, even for the purpose of passage, — a doctrine flowing immediately from the principle of territorial property, but which is too monstrous to be admitted. Another set concede territorial property and sovereignty, but make it subject to the right of other nations to use these waters for the purpose of navigation. Others again, like M. Ortolan and M.

<sup>1</sup> The learned Chief Justice then examined the opinions of writers upon International Law as to territorial jurisdiction over the littoral seas. — Ed.

Calvo, deny any right of territorial property, but concede "jurisdiction;" by which I understand them to mean the power of applying the law, applicable to persons on the land, to all who are within the territorial water, and the power of legislating in respect of it, so as to bind every one who comes within the jurisdiction, whether subjects or foreigners. Some, like M. Ortolan, would confine this jurisdiction to purposes of "safety and police," — by which I should be disposed to understand measures for the protection of the territory, and for the regulation of the navigation, and the use of harbors and roadsteads, and the maintenance of order among the shipping therein, rather than the general application of the criminal law.

Other authors — for instance, Mr. Manning — would restrict the jurisdiction to certain specified purposes in which the local state has an immediate interest, namely, the protection of its revenue and fisheries, the exacting of harbor and light dues, and the protection of its coasts in time of war.

Some of these authors — for instance, Professor Bluntschli — make a most important distinction between a commorant and a passing ship. According to this author, while the commorant ship is subject to the general law of the local state, the passing ship is liable to the local jurisdiction only in matters of "military and police regulations, made for the safety of the territory and population of the coast." None of these writers, it should be noted, discuss the question, or go the length of asserting that a foreigner in a foreign ship, using the waters in question for the purpose of navigation solely, on its way to another country, is liable to the criminal law of the adjoining country for an offence committed on board.

Now, when it is remembered that it is mainly on the statements and authority of these writers, and to opinions founded upon them, that we are called upon to hold that foreigners on the so-called territorial sea are subject to the general law of this country, the discrepancy of opinion which I have been pointing out becomes very material. Looking to this, we may properly ask those who contend for the application of the existing law to the littoral sea independently of legislation, to tell us the extent to which we are to go in applying it. Are we to limit it to three miles, or to extend it to six? Are we to treat the whole body of the criminal law as applicable to it, or only so much as relates to "police and safety"? Or are we to limit it, as one of these authors proposes, to the protection of fisheries and customs, the exacting of harbor and light dues, and the protection of our coasts in time of war? Which of these writers are we to follow? What is there in these conflicting views to guide us, in the total absence of precedent or legal sanction, as to the extent to which we may subject foreigners to our law? What is there in them which authorizes us to assume not only that Parliament can of right deal with the three-mile zone as forming part of our territory, but also that, by the mere assent of other nations, the sea to this extent has become so completely a part of our

territory as to be subject, without legislation, to the whole body of our existing law, civil and criminal?

But it is said that, although the writers on international law are disagreed on so many essential points, they are all agreed as to the power of a littoral state to deal with the three-mile zone as subject to its dominion, and that consequently we may treat it as subject to our law. But this reasoning strikes me as unsatisfactory; for what does this unanimity in the general avail us when we come to the practical application of the law in the particular instance, if we are left wholly in the dark as to the degree to which the law can be legitimately enforced? This unanimity of opinion that the littoral sea is, at all events for some purposes, subject to the dominion of the local state, may go far to show that, by the concurrence of other nations, such a state may deal with these waters as subject to its legislation. But it wholly fails to show that, in the absence of such legislation, the ordinary law of the local state will extend over the waters in question, — which is the point which we have to determine.

Not altogether uninfluenced, perhaps, by the diversity of opinion to which I have called attention, the argument in support of the prosecution presents itself — not without some sacrifice of consistency — in more than one shape. At one time it is asserted that, for the space of three miles, not only the sea itself, but the bed on which it rests, forms part of the territory or realm of the country owning the coast, as though it were so much land; so that the right of passage and anchorage might be of right denied to the ships of other nations. At another time it is said that, while the right is of a territorial character, it is subject to a right of passage by the ships of other nations. Sometimes the sovereignty is asserted, not as based on territorial right, but simply as attaching to the sea, over which it is contended that the nation owning the coast may extend its law to the foreigner navigating within it.

To those who assert that, to the extent of three miles from the coast, the sea forms part of the realm of England, the question may well be put, when did it become so? Was it so from the beginning? It certainly was not deemed to be so as to a three-mile zone, any more than as to the rest of the high seas, at the time the statutes of Richard II. were passed. For in those statutes a clear distinction is made between the realm and the sea, as also between the bodies of counties and the sea; the jurisdiction of the admiral being (subject to the exception already stated as to murder and mayhem) confined strictly to the latter, and its exercise “within the realm” prohibited in terms. The language of the first of these statutes is especially remarkable: —

“The admirals and their deputies shall not meddle from henceforth with anything done *within the realm of England*, but only with things done upon the sea.”

It is impossible not to be struck by the distinction here taken between the realm of England and the sea; or, when the two statutes are taken



together, not to see that the term "realm," used in the first statute, and "bodies of counties," the term used in the second statute, mean one and the same thing. In these statutes the jurisdiction of the admiral is restricted to the high seas, and, in respect of murder and mayhem, to the great rivers below the bridges, while whatever is within the realm, in other words, within the body of a county, is left within the domain of the common law. But there is no distinction taken between one part of the high sea and another. The three-mile zone is no more dealt with as within the realm than the seas at large. The notion of a three-mile zone was in those days in the womb of time. When its origin is traced, it is found to be of comparatively modern growth. The first mention of it by any writer, or in any court of this country, so far as I am aware, was made by Lord Stowell, with reference to a question of neutral rights, in the first year of the present century, in the case of *The Twee Gebroeders*, 3 C. Rob. 162. To this hour it has not, even in theory, yet settled into certainty. For centuries before it was thought of, the great landmarks of our judicial system had been set fast — the jurisdiction of the common law over the land and the inland waters contained within it, forming together the realm of England, that of the admiral over English vessels on the seas, the common property or highway of mankind.

But I am met by authority, and, beyond question, ancient authority, may be found in abundance for the assertion that the bed of the sea is part of the realm of England, part of the territorial possessions of the Crown. Coke, commenting on § 439 of Littleton, says, in explaining the words "out of the realm": —

"If a man be upon the sea of England, he is within the kingdom or realme of England, and within the ligeance of the King of England, as of his crowne of England. And yet *altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the lord admirall."

So Lord Hale, no doubt, in his work *De Jure Maris*, speaks of the narrow seas, and the soil thereof, as "part of the King's waste, demesnes, and dominions, whether in the body of a county or not." But this was said, not with reference to the theory of the three-mile zone, which had not then been thought of, but (following Selden) to the wild notion of sovereignty over the whole of the narrow seas. This pretension failing, the rest of the doctrine, as it seems to me, falls with it. Moreover, Hale stops short of saying that the bed of the sea forms part of the realm of England, as a portion of its territory. He speaks of it under the vague terms of "waste," "demesnes," or "dominions." He carefully distinguishes between the parts of the sea which are within the body of a county and those which are not.

It is true that, in his later work on the Pleas of the Crown, Lord Hale, speaking in the chapter on Treasons (vol. i. p. 154), of what is a levying of war against the King "within the realm," according to the

required averment in an indictment for that offence, instances the hostile invasion of the King's ships ("which," he observes, "are so many royal castles"); and this, he says, "is a levying of war within the realm;" the reason he assigns being that "the narrow seas are of the ligeance of the Crown of England," for which he cites the authority of Selden. Here, again, we have Lord Hale blindly following "Master Selden," in asserting that the narrow seas owe allegiance to the Crown of England. A hostile attack by a subject on a ship of war on the narrow seas would, I need scarcely say, be a levying of war against the sovereign, but it could not now be said to be high treason as having been done within the realm.

Blackstone (Comm. vol. i. p. 110) says that "the main or high seas" (which he afterwards describes as beginning at low-water mark) "are part of the realm of England," — here Mr. Stephen, feeling that his author was going too far, interposes the words "in one sense," — "for thereon," adds Blackstone, "our courts of Admiralty have jurisdiction; but they are not subject to the common law." This is, indeed, singular reasoning. Instead of saying that, because these seas are part of the realm of England, the Courts of Admiralty have jurisdiction over them, the writer reverses the position, and says, that because the Admiralty has jurisdiction these seas are part of the realm, — which certainly does not follow. If it did, as the jurisdiction of the Admiralty extended, as regards British ships, wherever the sea rolls, the entire ocean might be said to be within the realm.

But to what, after all, do these ancient authorities amount? Of what avail are they towards establishing that the soil in the three-mile zone is part of the territorial domain of the Crown? These assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded. Who at this day would venture to affirm that the sovereignty thus asserted in those times now exists? What English lawyer is there who would not shrink from maintaining — what foreign jurist who would not deny — what foreign government which would not repel such a pretension? I listened carefully to see whether any such assertion would be made; but none was made. No one has gone the length of suggesting, much less of openly asserting, that the jurisdiction still exists. It seems to me to follow that when the sovereignty and jurisdiction from which the property in the soil of the sea was inferred is gone, the territorial property which was suggested to be consequent upon it must necessarily go with it.

But we are met here by a subtle and ingenious argument. It is said that although the doctrine of the criminal jurisdiction of the admiral over foreigners on the four seas has died out, and can no longer be upheld, yet, as now, by the consent of other nations, sovereignty over this territorial sea is conceded to us, the jurisdiction formerly asserted may be revived and made to attach to the newly-acquired domain. I am unable to adopt this reasoning. *Ex concessis*, the jurisdiction over

foreigners in foreign ships never really existed, at all events, it has long been dead and buried, even the ghost of it has been laid. But it is evoked from its grave and brought to life for the purpose of applying it to a part of the sea which was included in the whole, as to which it is now practically admitted that it never existed. From the time the jurisdiction was asserted to the time when the pretension to it was dropped, it was asserted over this portion of the sea as part of the whole to which the jurisdiction was said to extend. If it was bad as to the whole indiscriminately, it was bad as to every part of the whole. But why was it bad as to the whole? Simply because the jurisdiction did not extend to foreigners in foreign ships on the high seas. But the waters in question have always formed part of the high seas. They are alleged in this indictment to be so now. How, then, can the admiral have the jurisdiction over them contended for if he had it not before? There having been no new statute conferring it, how has he acquired it?

To come back to the subject of the realm. I cannot help thinking that some confusion arises from the term "realm" being used in more than one sense. Sometimes it is used, as in the statute of Richard II., to mean the land of England, and the internal sea within it, sometimes as meaning whatever the sovereignty of the Crown of England extended, or was supposed to extend, over.

When it is used as synonymous with territory, I take the true meaning of the term "realm of England" to be the territory to and over which the common law of England extends — in other words, all that is within the body of any county — to the exclusion of the high seas, which come under a different jurisdiction only because they are not within any of those territorial divisions, into which, among other things for the administration of the law, the kingdom is parcelled out. At all events, I am prepared to abide by the distinction taken in the statutes of Richard II. between the realm and the sea. For centuries our judicial system in the administration of the criminal law has been divided into two distinct and independent branches, the one having jurisdiction over the land and any sea considered to be within the land; the other over the sea external to the land. No concurrent assent of nations, that a portion of what before was treated as the high sea, and as such common to all the world, shall now be treated as the territory of the local state, can of itself, without the authority of Parliament, convert that which before was in the eye of the law high sea into British territory, and so change the law, or give to the courts of this country, independently of legislation, a jurisdiction over the foreigner where they had it not before. The argument in support of the contrary appears to me, I must say, singularly inconsistent with itself. According to it the littoral sea is made to assume what I cannot help calling an amphibious character. At one time it is land, at another it is water. Is it desired to apply the law of the shore to it, so as to make the foreigner subject to that law? — it becomes so much territory. Do you wish to

keep it within the jurisdiction of the admiral, as you must do to uphold this indictment? — it is made to resume its former character as part of the high seas. Unable to follow this vacillating reasoning, I must add that, to my mind, the contention that the littoral sea forms part of the realm or territory of Great Britain is fatal to the argument which it is intended to support. For, if the sea thus becomes part of the territory, as though it were actually *inter fauces terre*, it seems to follow that it must become annexed to the main land, and so become part of the adjoining county, in which case there would be an end to the Admiralty jurisdiction. The littoral sea cannot be land for one purpose and high sea for another. Nor is anything gained by substituting the term “territory” for land. The law of England knows but of one territory, — that which is within the body of a county. All beyond it is the high sea, which is out of the province of English law as applicable to the shore, and to which that law cannot be extended except by legislation.

It does not appear to me that the argument for the prosecution is advanced by reference to encroachments on the sea, in the way of harbors, piers, breakwaters, and the like, even when projected into the open sea, or of forts erected in it, as is the case in the Solent. Where the sea, or the bed on which it rests, can be physically occupied permanently, it may be made subject to occupation in the same manner as unoccupied territory. In point of fact, such encroachments are generally made for the benefit of the navigation; and are therefore readily acquiesced in. Or they are for the purposes of defence, and come within the principle that a nation may do what is necessary for the protection of its own territory. Whether, if an encroachment on the sea were such as to obstruct the navigation to the ships of other nations, it would not amount to a just cause of complaint, as inconsistent with international rights, might, if the case arose, be deserving of serious consideration. That such encroachments are occasionally made seems to me to fall very far short of establishing such an exclusive property in the littoral sea as that, in the absence of legislation, it can be treated, to all intents and purposes, as part of the realm.

Again, the fact, adverted to in the course of the discussion, that in the west of England mines have been run out under the bed of the sea to beyond low-water mark, seems to me to avail but little towards the decision of the question of territorial property in the littoral sea. But for the Act of 21 & 22 Vict. c. 109, to which our attention has been specially directed, I should have thought the matter simple enough. Between high and low water mark the property in the soil is in the Crown, and it is to be assumed that it is by grant or license from the Crown, or by prescription, which presupposes a grant, that a mine is carried beneath it. Beyond low-water mark the bed of the sea might, I should have thought, be said to be unappropriated, and, if capable of being appropriated, would become the property of the first occupier. I should not have thought that the carrying one or two mines into the

bed of the sea beyond low-water mark could have any real bearing on a question of international law like the present.

But the Act just referred to, and the circumstances out of which it arose, have been brought impressively to our attention by the Lord Chief Justice of the Common Pleas, as showing that, according to parliamentary exposition, the bed of the sea beyond low-water mark is in the Crown. I cannot help thinking that, when the matter comes to be looked at a little more closely, it will be found that the facts by no means warrant this conclusion. The Duchy of Cornwall, which is vested in His Royal Highness the Prince of Wales, extends, as is known, to low-water mark. Mines existing under the bed of the sea within the low-water mark having been carried out beyond it, a question was raised on the part of the Crown as to whether the minerals beyond the low-water mark, and not within the county of Cornwall, as also those lying under the sea-shore between high and low-water mark within the county of Cornwall, and under the estuaries and tidal rivers within the county, did not belong to the Crown. The matter having been referred to Sir John Patteson, his decision as to the mines and minerals below low-water mark was in favor of the Crown; with reference to the others, in favor of the duchy. Not having had the advantage of seeing Sir John Patteson's award, I am unaware whether the precise grounds on which his decision proceeded are stated in it, but the terms in which it was framed may be gathered with perfect precision from the recitals of the Act of Parliament which, by arrangement, was passed shortly afterwards to give statutory effect to the award. From the recitals in the preamble to the Act it appears that the award was very carefully, I may say cautiously, drawn. After stating the matter in dispute, and the reference to Sir John Patteson, the preamble goes on to recite that the arbitrator had decided, —

“First, that the right to all mines and minerals lying under the sea-shore between high and low-water marks within the said county of Cornwall, and under estuaries and tidal rivers, and other places, even below low-water mark, being in and part of the said county, is vested in His Royal Highness as part of the soil and territorial possessions of the Duchy of Cornwall. Secondly, that the right to all mines and minerals lying below low-water mark, under the open sea adjacent to, but not being part of, the county of Cornwall, is vested in Her Majesty the Queen in right of her Crown, although such minerals may or might be won by workings commenced above low-water mark and extended below it.”

The difference between the two parts of this recital is at once apparent. When dealing with that which is within low-water mark, the award declares the right to the mines and minerals under the sea-shore to be vested in His Royal Highness “as part of the soil and territorial possessions of the Duchy of Cornwall.” But when the learned arbitrator comes to deal with the mines and minerals below low-water

mark, he stops short of saying that these mines and minerals belong to Her Majesty by virtue of any ownership in the soil. He confines himself to awarding that the right to such mines and minerals is vested in Her Majesty "in right of her Crown." What the grounds were on which this decision was based I can only conjecture. Sir John Patteson may have held, on the authority of *Collis* (p. 53), that a subject cannot have any ownership in the soil below low-water mark, — and, though standing next to the Throne, the Prince of Wales is still a subject, — and that, as between the Crown and a subject as regards property in or under the open sea, the Crown had the better right. Or the decision may have been founded on the peculiar constitution of the Duchy of Cornwall, which is settled by Act of Parliament and occasionally reverts to the Crown. I cannot help thinking that if the arbitrator had proceeded on the ground that the bed of the sea below low-water mark belonged to the Crown, he would have said so, as he had just before done with reference to the soil above low-water mark. It is true that, when we come to the enacting part of the statute, that which had been left unsaid by Sir John Patteson is supplied. The mines and minerals beyond low-water mark are enacted and declared to be in the Queen, in right of her Crown, as part of the soil and possessions of the Crown, just as the mines and minerals within low-water mark are stated to be vested in the Prince of Wales as Duke of Cornwall, in right of the Duchy of Cornwall, as part of the soil and possessions of the duchy. But it is expressly declared that this is to be taken to be so only "as between the Queen in right of her Crown, and the Prince of Wales in right of the Duchy of Cornwall," and the rights of all other persons are expressly preserved. I am surprised, I own, that we should be asked to look on this piece of legislation as a parliamentary recognition of the universal right of the Crown to the ownership of the bed of the sea below low-water mark. This was a bill for the settlement of the question as to the right to particular mines and minerals between the Crown and the duchy, a measure in which both the royal personages particularly concerned and their respective advisers concurred, and in which no other person whatever was interested. To what member of Parliament, even the most eccentric, could it possibly have occurred to raise an objection to it on the ground that it involved an assertion of the Queen's right of property in the bed of the sea? To whom would it occur that, in passing it, Parliament was asserting the right of the Crown to the bed of the sea over the three-mile distance, instead of settling a dispute as to the specific mines which were in question? With the most unfeigned respect for my learned colleague, I cannot but think that he has attached to this piece of legislation a degree of importance to which it is by no means entitled.

It thus appearing, as it seems to me, that the littoral sea beyond low-water mark did not, as distinguished from the rest of the high seas, originally form part of the territory of the realm, the question again presents itself, when and how did it become so? Can a portion

of that which was before high sea have been converted into British territory, without any action on the part of the British Government or legislature — by the mere assertions of writers on public law — or even by the assent of other nations?

And when in support of this position, or of the theory of the three-mile zone in general, the statements of the writers on international law are relied on, the question may well be asked, upon what authority are these statements founded? When and in what manner have the nations, who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given.

For, even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world. For writers on international law, however valuable their labors may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage, — an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.

When I am told that all other nations have assented to such an absolute dominion on the part of the littoral state, over this portion of the sea, as that their ships may be excluded from it, and that, without any open legislation, or notice to them or their subjects, the latter may be held liable to the local law, I ask, first, what proof there is of such assent as here asserted; and, secondly, to what extent has such assent been carried? a question of infinite importance, when, undirected by legislation, we are called upon to apply the law on the strength of such

assent. It is said that we are to take the statements of the publicists as conclusive proof of the assent in question, and much has been said to impress on us the respect which is due to their authority, and that they are to be looked upon as witnesses of the facts to which they speak, witnesses whose statements, or the foundation on which those statements rest, we are scarcely at liberty to question. I demur altogether to this position. I entertain a profound respect for the opinion of jurists when dealing with the matters of juridical principle and opinion, but we are here dealing with a question not of opinion, but of fact, and I must assert my entire liberty to examine the evidence and see upon what foundation these statements are based. The question is not one of theoretical opinion, but of fact, and, fortunately, the writers upon whose statements we are called upon to act have afforded us the means of testing those statements by reference to facts. They refer us to two things, and to these alone, — treaties and usage. Let us look a little more closely into both.

First, then, let us see how the matter stands as regards treaties. It may be asserted, without fear of contradiction, that the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the state shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in the ships of other nations, has never been made the subject-matter of any treaty, or, as matter of acknowledged right, has formed the basis of any treaty, or has even been the subject of diplomatic discussion. It has been entirely the creation of the writers on international law. It is true that the writers who have been cited constantly refer to treaties in support of the doctrine they assert. But when the treaties they refer to are looked at, they will be found to relate to two subjects only, — the observance of the rights and obligations of neutrality, and the exclusive right of fishing. In fixing the limits to which these rights should extend, nations have so far followed the writers on international law as to adopt the three-miles range as a convenient distance. There are several treaties by which nations have engaged, in the event of either of them being at war with a third, to treat the sea within three miles of each other's coasts as neutral territory, within which no warlike operations should be carried on; instances of which will be found in the various treatises on international law.

Thus, for instance, in the treaties of commerce, between Great Britain and France, of September, 1786; between France and Russia, of January, 1787; between Great Britain and the United States, of October, 1794, each contracting party engages, if at war with any other nation, not to carry on hostilities within cannon-shot of the coast of the other contracting party; or, if the other should be at war, not to allow its vessels to be captured within the like distance. There are many other treaties of the like tenor, a list of which is given by Azuni (vol. ii. p. 78); and various ordinances and laws have been made by the different states in order to give effect to them.



Again, nations, possessing opposite or neighboring coasts, bordering on a common sea, have sometimes found it expedient to agree that the subjects of each shall exercise an exclusive right of fishing to a given distance from their own shores, and here also have accepted the three miles as a convenient distance. Such, for instance, are the treaties made between this country and the United States in relation to the fishery off the coast of Newfoundland, and those between this country and France in relation to the fishery on their respective shores; and local laws have been passed to give effect to these engagements.

But in all these treaties this distance is adopted, not as matter of existing right established by the general law of nations, but as matter of mutual concession and convention. Instead of upholding the doctrine contended for, the fact of these treaties having been entered into has rather the opposite tendency: for it is obvious that, if the territorial right of a nation bordering on the sea to this portion of the adjacent waters had been established by the common assent of nations, these treaty arrangements would have been wholly superfluous. Each nation would have been bound, independently of treaty engagement, to respect the neutrality of the other in these waters as much as in its inland waters. The foreigner invading the rights of the local fisherman would have been amenable, consistently with international law, to local legislation prohibiting such infringement, without any stipulation to that effect by treaty. For what object, then, have treaties been resorted to? Manifestly in order to obviate all questions as to concurrent or conflicting rights arising under the law of nations. Possibly, after these precedents and all that has been written on this subject, it may not be too much to say that, independently of treaty, the three-mile belt of sea might at this day be taken as belonging, for these purposes, to the local state. But it is scarcely logical to infer, from such treaties alone, that, because nations have agreed to treat the littoral sea as belonging to the country it adjoins, for certain specified objects, they have therefore assented to forego all other rights previously enjoyed in common, and have submitted themselves, even to the extent of the right of navigation on a portion of the high seas, and the liability of their subjects therein to the criminal law, to the will of the local sovereign, and the jurisdiction of the local state. Equally illogical is it, as it seems to me, from the adoption of the three-mile distance in these particular instances, to assume, independently of everything else, a recognition, by the common assent of nations, of the principle that the subjects of one state passing in ships within three miles of the coast of another shall be in all respects subject to the law of the latter. It may be that the maritime nations of the world are prepared to acquiesce in the appropriation of the littoral sea; but I cannot think that these treaties help us much towards arriving at the conclusion that this appropriation has actually taken place. At all events, the question remains, whether judicially we can infer that the nations who have been parties to these treaties, and still further those who have

not, have thereby assented to the application of the criminal law of other nations to their subjects on the waters in question, and on the strength of such inference so apply the criminal law of this country.

The uncertainty in which we are left, so far as judicial knowledge is concerned, as to the extent of such assent, likewise presents, I think, a very serious obstacle to our assuming the jurisdiction we are called upon to exercise, independently of the, to my mind, still more serious difficulty, that we should be assuming it without legislative warrant.

So much for treaties. Then how stands the matter as to usage, to which reference is so frequently made by the publicists in support of their doctrine? When the matter is looked into, the only usage found to exist is such as is connected with navigation, or with revenue, local fisheries, or neutrality, and it is to these alone that the usage relied on is confined. Usage as to the application of the general law of the local state to foreigners on the littoral sea there is actually none. No nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through these waters subject to its law, otherwise than in respect of the matters to which I have just referred. Nor have the tribunals of any nation held foreigners in these waters amenable generally to the local criminal law in respect of offences. It is for the first time in the annals of jurisprudence that a court of justice is now called upon to apply the criminal law of the country to such a case as the present.

It may well be, I say again, that — after all that has been said and done in this respect — after the instances which have been mentioned of the adoption of the three-mile distance, and the repeated assertion of this doctrine by the writers on public law, a nation which should now deal with this portion of the sea as its own, so as to make foreigners within it subject to its law, for the prevention and punishment of offences, would not be considered as infringing the rights of other nations. But I apprehend that as the ability so to deal with these waters would result, not from any original or inherent right, but, from the acquiescence of other states, some outward manifestation of the national will, in the shape of open practice or municipal legislation, so as to amount, at least constructively, to an occupation of that which was before unappropriated, would be necessary to render the foreigner, not previously amenable to our general law, subject to its control. That such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country — leaving the question of its consistency with international law to be determined between the governments of the respective nations — can of course admit of no doubt. The question is whether such legislation would not, at all events, be necessary to justify our courts in applying the law of this country to foreigners under entirely novel circumstances in which it has never been applied before.

It is obviously one thing to say that the legislature of a nation may, from the common assent of other nations, have acquired the full right to legislate over a part of that which was before high sea, and as such common to all the world; another and a very different thing to say that the law of the local state becomes thereby at once, without anything more, applicable to foreigners within such part, or that, independently of legislation, the courts of the local state can *proprio vigore* so apply it. The one position does not follow from the other; and it is essential to keep the two things, the power of Parliament to legislate, and the authority of our courts, without such legislation, to apply the criminal law where it could not have been applied before, altogether distinct, which, it is evident, is not always done. It is unnecessary to the defence, and equally so to the decision of the case, to determine whether Parliament has the right to treat the three-mile zone as part of the realm consistently with international law. That is a matter on which it is for Parliament itself to decide. It is enough for us that it has, so far as to be binding upon us, the power to do so. The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of opinion that we cannot, and that it is only in the instances in which foreigners on the seas have been made specifically liable to our law by statutory enactment that that law can be applied to them.<sup>1</sup>

But the difficulties which stand in the way of the prosecution are not yet exhausted. A technical difficulty presents itself, which appears to be of a formidable character. Assuming everything, short of the ultimate conclusion, to be conceded to the prosecution — granting that the three-mile zone forms part of the territory or realm of England, and that without parliamentary interference the territorial sea has become part of the realm of England, so that jurisdiction has been acquired over it, the question arises, — In whom is the jurisdiction? The indictment alleges that the offence was committed on the high seas. To support this averment the place in question must still remain part of the high sea. But if it is to be held to be the high sea, and so within the jurisdiction of the admiral, the prosecution fails, if the admiral never had jurisdiction over foreigners in foreign ships, the proof of which totally fails, and the negative of which, I think, must be considered as established: and no assent on the part of foreign nations to the exercise of dominion and jurisdiction over these waters can, without an Act of Parliament, confer on the admiral or any other judge of this country a larger jurisdiction than he possessed before. If the littoral sea is to be considered territory — in other words, no longer high sea — the present indictment fails, and this, whether the part in question has become part of a county or not. The only distinction known to the law of England, as regards the sea, is between such part of the sea

<sup>1</sup> The learned Chief Justice then examined the statutes, and decided that there was no statutory jurisdiction in this case. — Ed.

as is within the body of a county and such as is not. In the first there is jurisdiction over the foreigner on a foreign ship; in the other, there is not. Such a thing as sea which shall be at one and the same time high sea and also part of the territory of the realm, is unknown to the present law, and never had an existence, except in the old and senseless theory of a universal dominion over the narrow seas.

To put this shortly. To sustain this indictment the littoral sea must still be considered as part of the high seas, and as such, under the jurisdiction of the admiral. But the admiral never had criminal jurisdiction over foreign ships on the high seas. How, when exercising the functions of a British judge, can he, or those acting in substitution for him, assume a jurisdiction which heretofore he did not possess, unless authorized by statute? On the other hand, if this sea is to be considered as territory, so as to make a foreigner within it liable to the law of England, it cannot come under the jurisdiction of the Admiralty.

In the result, looking to the fact that all pretension to sovereignty or jurisdiction over foreign ships in the narrow seas has long since been wholly abandoned — to the uncertainty which attaches to the doctrine of the publicists as to the degree of sovereignty and jurisdiction which may be exercised on the so-called territorial sea — to the fact that the right of absolute sovereignty therein, and of penal jurisdiction over the subjects of other states, has never been expressly asserted or conceded among independent nations, or, in practice, exercised and acquiesced in, except for violation of neutrality or breach of revenue or fishery laws, which, as has been pointed out, stand on a different footing — as well as to the fact that, neither in legislating with reference to shipping, nor in respect of the criminal law, has Parliament thought proper to assume territorial sovereignty over the three-mile zone, so as to enact that all offences committed upon it, by foreigners in foreign ships, should be within the criminal law of this country, but, on the contrary, wherever it was thought right to make the foreigner amenable to our law, has done so by express and specific legislation — I cannot think that, in the absence of all precedent, and of any judicial decision or authority applicable to the present purpose, we should be justified in holding an offence, committed under such circumstances, to be punishable by the law of England, especially as in so holding we must declare the whole body of our penal law to be applicable to the foreigner passing our shores in a foreign vessel on his way to a foreign port.

I am by no means insensible to the argument *ab inconvenienti*, pressed upon us by the Solicitor-General. It is, no doubt, desirable, looking to the frequency of collisions in the neighborhood of our coasts, that the commanders of foreign vessels, who, by unskilful navigation or gross want of care, cause disaster or death, should be as much amenable to the local law as those navigating our own vessels, instead of redress having to be sought in the, perhaps, distant country of the offender. But the remedy for the deficiency of the law, if it can be made good consistently with international law, — as to which we are not

called upon to pronounce an opinion. — should be supplied by the action of the legislature, with whom the responsibility for any imperfection of the law alone rests, not by a usurpation on our part of a jurisdiction which, without legislation, we do not judicially possess.

This matter has been sometimes discussed upon the assumption that the alternative of the non-exercise of jurisdiction on the part of our courts must be the total impunity of foreigners in respect of collision arising from negligence in the vicinity of our coast. But this is a mistaken view. If by the assent of other nations the three-mile belt of sea has been brought under the dominion of this country, so that consistently with the right of other nations it may be treated as a portion of British territory, which, of course, is assumed as the foundation of the jurisdiction which the courts of law are here called upon to exercise, it follows that Parliament can legislate in respect of it. Parliament has only to do so, and the judges of the land will, of course, as in duty bound, give full effect to the law which Parliament shall so create.<sup>1</sup>

COLERIDGE, C. J. I agree in thinking it clear that unless the place where the offence was committed was part of the realm of England locally, or unless the offence itself was committed on board a British ship, whether the British ship was locally within the realm of England, or without it, the conviction cannot stand. But first, I think the offence was committed within the realm of England; and if so, there was jurisdiction to try it. Whether there was any jurisdiction, and if there were, what particular court was to exercise it, are two separate questions; and I am here concerned only with the former. Now the offence was committed much nearer to the line of low-water mark than three miles, and, therefore, in my opinion, upon English territory. I pass by for the moment the question of the exact limit of the realm of England beyond low-water mark. I am of opinion that it does go beyond low-water mark, and if it does, no limit has ever been suggested which could exclude from the realm the place where this offence was committed. But for the difference of opinion upon the bench and for the great deference which is due to those who differ from me, I should have said it was impossible to hold that England ended with low-water mark. I do not of course forget that it is freely admitted to be within the competency of Parliament to extend the realm, how far soever it pleases to extend it by enactments, at least so as to bind the tribunals of the country; and I admit equally freely that no statute has in plain terms, or by definite limits, so extended it. But, in my judgment, no Act of Parliament was required. The proposition contended for, as I understand, is that for any act of violence committed by a foreigner upon an English subject within a few feet of low-water

<sup>1</sup> Part of the opinion is omitted.

BRAMWELL, J. A., KELLY, C. B., LUSH, J., and Sir R. PHILLIMORE delivered opinions concurring with that of COCKBURN, C. J. POLLOCK, B., and FIELD, J. also concurred.

BRETT and AMPHLETT, JJ. A., DENMAN, GROVE and LINDLEY, JJ., delivered opinions concurring with that of COLERIDGE, C. J. — ED.

mark, unless it happens on board a British ship, the foreigner cannot be tried, and is punishable. As I understand the proposition, it follows, further, that even if the English subject be an officer of the Crown, and the violence is committed by the foreigner in resisting the English officer in the execution of duties which the penal or police laws of the country compel him to perform, laws to which it is admitted this country has for a series of years subjected her coast waters, still the consequence is the same, and the act of resistance, though resulting in the death of the officer, unless it takes place on board a British ship, cannot be made the subject of any criminal proceeding in any court of the country where the officer has been outraged. This it is said has always been the law, and it is the law now. The argument *ab inconvenienti* is perhaps not one which sound logic recognizes, and a startling conclusion does not always show that the premises from which it follows are untenable. But the inconvenience here is so grave, and the conclusion so startling, as to make it reasonable, I think, to say that the burden of proof lies heavy upon those who disregard the inconvenience, and maintain the conclusion. Now my brothers BRETT and LINDLEY have shown that by a *consensus* of writers, without one single authority to the contrary, some portion of the coast waters of a country is considered for some purposes to belong to the country the coasts of which they wash. I concur in thinking that the discrepancies to be found in these writers as to the precise extent of the coast waters which belong to a country (discrepancies, after all, not serious since the time at least of Grotius) are not material in this question; because they all agree in the principle that the waters, to some point beyond low-water mark, belong to the respective countries, on grounds of sense if not of necessity, belong to them as territory of sovereignty, in property, exclusively, so that the authority of France or Spain, of Holland or England, is the only authority recognized over the coast waters which adjoin these countries. This is established as solidly as, by the very nature of the case, any proposition of international law can be. Strictly speaking, international law is an inexact expression, and it is apt to mislead if its inexactness is not kept in mind. Law implies a lawgiver, and a tribunal capable of enforcing it and coercing its transgressors. But there is no common lawgiver to sovereign states; and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not, in this country at least, *per se* bind the tribunals. Neither, certainly, does a *consensus* of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreement. Regarding jurists,

then, in the light of witnesses, it is their competency rather than their ability which most concerns us. We find a number of men of education, of many different nations, most of them quite uninterested in maintaining any particular thesis as to the matter now in question, agreeing generally for nearly three centuries in the proposition that the territory of a maritime country extends beyond low-water mark. I can hardly myself conceive stronger evidence to show that, as far as it depends on the agreement of nations, the territory of maritime countries does so extend. For myself I must add that, besides their competency, I have the greatest respect and admiration for the character and abilities of such of these writers as I am personally familiar with. It is not difficult in the works of a voluminous writer, or indeed of any writer, nay, even in the reported judgments of great judges, to find statements exaggerated, or untenable, beliefs which lapse of time has shown to be unwise, prejudices which must always have been foolish. But these things do not detract from the just authority of distinguished men, and, if the matter were to be determined for the first time, I should not hesitate to hold that civilized nations had agreed to this prolongation of the territory of maritime states, upon the authority of the writers who have been cited in this argument as laying down the affirmative of this proposition. But it is not now to be done for the first time. For from the two judgments to which I have already had occasion to refer it sufficiently appears that a number of English judges, of the very highest authority, have themselves accepted and acted upon the authority of these jurists. Lord Talbot, Lord Hardwicke, Lord Mansfield, Lord Stowell, and Dr. Lushington, form altogether a body of judges sufficient to support the authority of the writers upon whom they relied. Furthermore, it has been shown that English judges have held repeatedly that these coast waters are portions of the realm. It is true that this particular point does not seem ever distinctly to have arisen. But Lord Coke, Lord Stowell, Dr. Lushington, Lord Hatherley, L. C., Erle, C. J., and Lord Wensleydale (and the catalogue might be largely extended) have all, not hastily, but in writing, in prepared and deliberate judgments, as part of the reasoning necessary to support their conclusions, used language, some of them repeatedly, which I am unable to construe, except as asserting, on the part of these eminent persons, that the realm of England, the territory of England, the property of the State and Crown of England over the water and the land beneath it, extends at least so far beyond the line of low water on the English coast as to include the place where this offence was committed. I should only waste time if I were to go through again the cases which my learned brothers have so fully and so accurately examined. It is, I presume, competent for the court to overrule those cases; but at least it must be admitted that they decide as much as this. It is, perhaps, referring to weaker authorities in order to support stronger ones; but I will add that the English and American text writers, and two at least of the most eminent American judges,

Marshall and Story, have held the same thing. Further, at least in one remarkable instance, the British Parliament has declared and enacted this to be the law. In the present reign two questions arose between Her Majesty and the Prince of Wales as to the property in minerals below high-water mark around the coast of Cornwall. The first question was as to the property in minerals between high and low-water mark around the coasts of that county, and as to the property in minerals below low-water mark won by an extension of workings begun above low-water mark. This was referred by Lord Chancellor Cranworth on the part of Her Majesty, and by Lord Kingsdown, the then Chancellor of the Duchy, on the part of the Prince of Wales, to the arbitration of Sir John Patteson. His decision led to the passing of an Act of Parliament. And a further question as to the minerals below low-water mark was referred by Lord Selborne, then Sir Roundell Palmer, the Queen's Attorney-General, and Sir William Alexander, the Attorney-General to the Prince of Wales, to the arbitration of Sir John Coleridge. All the proceedings in both references were in writing, and by the kindness of Viscount Portman, the present Lord Warden of the Stannaries, I have been furnished with copies of the whole of them. As might be expected from the known characters of the persons who drew and settled all the statements in both cases, the greatest learning and ability were displayed in them; most of the authorities cited before us are cited in the arguments on behalf of the Crown and the Prince of Wales, and some others of considerable importance not cited to us are cited there. The whole argument on the part of the Crown was founded on the proposition that the *fundus maris* below low-water mark, and therefore beyond the limits of the county of Cornwall, belonged in property to the Crown. The Prince was in possession of the disputed mines; he had worked them from land undoubtedly his own, and, therefore, unless the Crown had a right of property in the bed of the sea, not as first occupier, for the prince was first occupier, and was in occupation, the Crown must have failed. The argument on behalf of the Duchy was twofold: first, that all which adjoined and was connected with the County of Cornwall passed to the Dukes of Cornwall under the terms of the original grant to them at the time of the creation of the Duchy; and, therefore, that even if the bed of the sea elsewhere belonged to the Crown, it had passed from the Crown to the duke in the seas adjacent to Cornwall; secondly, that the bed of the sea did not belong to the Crown, and that the prince was entitled, as first occupier, to the mines thereunder. I pass by, as not relevant to the present inquiry, the argument as to the property in the soil between high and low water, and I omit Sir John Patteson's decision on that point in favor of the Duchy as not material. On the second point he thus expressed himself:—

“I am of opinion, and so decide, that the right to the minerals below low-water mark remains and is vested in the Crown, although those minerals may be won by workings commenced above low-water mark and extended below it.”



And he recommended the passing of an Act of Parliament to give practical effect to his decision, so far as it was in favor of the Crown. The Act of Parliament accordingly was passed, the 21 & 22 Viet. c. 109, a public Act. By s. 2 it is not merely enacted, but declared and enacted as follows:—

“All mines and minerals lying below low-water mark under the open sea adjacent to but not being part of the County of Cornwall are, as between the Queen’s Majesty, in right of her Crown, on the one hand, and His Royal Highness Albert Edward Prince of Wales and Duke of Cornwall, in right of his Duchy of Cornwall, on the other hand, vested in Her Majesty the Queen in right of her Crown as part of the soil and territorial possessions of the Crown.”

A subsequent question was raised as to minerals in the beds of estuaries below low-water mark, but, so to speak, *infra fœuces Cornubiæ*; and this question, which arose after the death of Sir John Patteson, was referred for decision to Sir John Coleridge. This decision was substantially in favor of the Prince, and the arguments in the former case were repeated before him; but as he had to decide the matter after the passing of the Act of Parliament, and in truth as to the construction to be placed upon its clauses, it is not material to refer in detail to the words of his judgment and award. It is true, that the particular question between Her Majesty and the Prince of Wales, which arose in respect of the bed of the sea adjacent to the county of Cornwall, could not, as far as I know, arise in respect of the bed of the sea adjacent to any other county. But it might well arise between Her Majesty and private persons all round the British islands. The sovereign stands in no more peculiar relation to Cornwall than she does to Kent. There is no reason, legal or otherwise, as far as I am aware, why the bed of the sea “adjacent to but not part of the county of Cornwall” should be, and why the bed of the sea adjacent to, but not part of the county of Kent, where this offence was committed, should *not* be “part of the soil and territorial possession of the Crown,” in the words of the Act of Parliament. Parliament did but apply to a particular case, in order to settle a question between the two highest persons in the state, that which is and always has been the law of this country. We have therefore it seems the express and definite authority of Parliament for the proposition that the realm does not end with low-water mark, but that the open sea and the bed of it are part of the realm and of the territory of the sovereign. If so it follows that British law is supreme over it, and that the law must be administered by some tribunal. It cannot, for the reasons assigned by my Brother BRETT, be administered by the Judges of Oyer and Terminer; it can be, and always could be, by the Admiralty, and if by the Admiralty, then by the Central Criminal Court. I do not feel much pressed by the undoubted fact that no record can be found of the exercise of this particular authority. Cases of collision are not often the subject of criminal inquiry, they do not often happen within local limits so as to

raise this particular question. If they were cases of wanton violence they would in former days, I conceive, have been very summarily disposed of. Sometimes, no doubt, the fact that a jurisdiction has never been exercised is a strong argument against the existence of the jurisdiction; but the force of this argument varies with circumstances; and though undoubtedly it is a matter to be considered, it does not, I think, in this case outweigh the arguments which establish its existence. On the whole, therefore, I am of opinion on the first point that the conviction is right. I am of the same opinion, though with some doubt, upon the second, that is, that the offence was committed on board an English ship. If this had been murder it would, as I understand the law, be clear that the offence was so committed. I need cite no further authority than the case of *Reg. v. Armstrong*, 13 Cox Cr. C. 184, decided in 1875, by my lamented brother Archibald. I think I follow, and I am sure I feel the weight of, the reasoning which has brought the Lord Chief Justice to the opposite conclusion on this point. But on the whole, though not without some hesitation, I concur in the reasoning of my brother DENMAN, and I think the same rule should apply in manslaughter which applies in murder. And on the second point, therefore, I am of opinion that the conviction was right and should be affirmed.<sup>1</sup>

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### WILDENHUS'S CASE.

SUPREME COURT OF THE UNITED STATES. 1886.

[Reported 120 U. S. 1.]

THIS appeal brought up an application made to the Circuit Court of the United States for the District of New Jersey, by Charles Mali, the "Consul of His Majesty the King of the Belgians, for the States of New York and New Jersey, in the United States," for himself as such consul, "and in behalf of one Joseph Wildenhus, one Gionviennie Gobnbosich, and one John J. Ostenmeyer," for the release, upon a writ of *habeas corpus*, of Wildenhus, Gobnbosich, and Ostenmeyer from the custody of the keeper of the common jail of Hudson County, New Jersey, and their delivery to the consul, "to be dealt with according to the law of Belgium." The facts on which the application rested were thus stated in the petition for the writ:—

"*Second.* That on or about the sixth day of October, 1886, on board the Belgian steamship *Noordland*, there occurred an affray between the said Joseph Wildenhus and one Fijens, wherein and whereby it is charged that the said Wildenhus stabbed with a knife and inflicted upon the said Fijens a mortal wound, of which he afterwards died.

"*Third.* That the said Wildenhus is a subject of the Kingdom of

<sup>1</sup> See also *Ellis v. Mitchell* (Supreme Court of Hong Kong, 1874), U. S. Foreign Relations, 1875, 600, and the accompanying diplomatic correspondence. — Ed.

Belgium and has his domicile therein, and is one of the crew of the said steamship *Noordland*, and was such when the said affray occurred.

“*Fourth.* That the said *Fijens* was also a subject of Belgium and had his domicile and residence therein, and at the time of the said affray, as well as at the time of his subsequent death, was one of the crew of the said steamship.

“*Fifth.* That at the time said affray occurred the said steamship *Noordland* was lying moored at the dock of the port of Jersey City, in said State of New Jersey.

“*Sixth.* That the said affray occurred and ended wholly below the deck of the said steamship, and that the tranquillity of the said port of Jersey City was in nowise disturbed or endangered thereby.

“*Seventh.* That said affray occurred in the presence of several witnesses all of whom were and still are of the crew of the said vessel, and that no other person or persons except those of the crew of said vessel were present or near by.

“*Eighth.* Your petitioner therefore respectfully shows unto this honorable court that the said affray occurred outside of the jurisdiction of the said State of New Jersey.

“*Ninth.* But, notwithstanding the foregoing facts, your petitioner respectfully further shows that the police authorities of Jersey City, in said State of New Jersey, have arrested the said *Joseph Wildenhus*, and also the said *Gionviennie Gobubosich* and *John J. Ostenmeyer*, of the crew of the said vessel (one of whom is a quartermaster thereof), and that said *Joseph Wildenhus* has been committed by a police magistrate, acting under the authority of the said state, to the common jail of the county of Hudson, on a charge of an indictable offence under the laws of the said State of New Jersey, and is now held in confinement by the keeper of the said jail, and that the others of the said crew arrested as aforesaid are also detained in custody and confinement as witnesses to testify in such proceedings as may hereafter be had against the said *Wildenhus*.”

MR. CHIEF JUSTICE WAITE,<sup>1</sup> after stating the case as above reported, delivered the opinion of the court.

By §§ 751 and 753 of the Revised Statutes the courts of the United States have power to issue writs of *habeas corpus* which shall extend to prisoners in jail when they are in “custody in violation of the Constitution or a law or treaty of the United States,” and the question we have to consider is, whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement: for, as was said by Chief Justice Mar-

<sup>1</sup> The arguments and part of the opinion are omitted. ED.

shall in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *United States v. Diekelman*, 92 U. S. 520; 1 Phillimore's *Int. Law*, 3d ed. 483, § 351; Twiss' *Law of Nations in Time of Peace*, 229, § 159; Creasy's *Int. Law*, 167, § 176; Halleck's *Int. Law*, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina v. Cunningham*, Bell C. C. 72; s. c. 8 Cox C. C. 104; *Regina v. Anderson*, 11 Cox C. C. 198, 204; s. c. L. R. 1 C. C. 161, 165; *Regina v. Keyn*, 13 Cox C. C. 403, 486, 525; s. c. 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.

[The learned Chief Justice here stated the terms of successive conventions entered into between the United States and foreign nations, and proceeded:—]

It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship and jurisdiction in civil matters arising out of disputes or differences on board, that is to

say, between those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact, they were expressly prohibited from interfering with the local police in matters of that kind. The cases of "The Sally" and "The Newton" (Wheat. Internat. Law, 3d ed., 153), are illustrative of this position. That of "The Sally" related to the discipline of the ship, and that of "The Newton" to the maintenance of order on board. In neither case was the disturbance of a character to affect the peace or the dignity of the country.

In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the State which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

Next came a form of convention which in terms gave the consuls authority to cause proper order to be maintained on board and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the convention with Belgium which we have now to consider. This treaty is the law which now governs the conduct of the United States and Belgium towards each other in this particular. Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done — the disorder that has arisen — on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the "public repose" of the people who look to the state of New Jersey for their protection. If the thing done — "the disorder," as it is called in the treaty — is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mat-

disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they as a rule care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder" the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a "disorder" which will "disturb tranquillity and public order on shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.

This is fully in accord with the practice in France, where the government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of "The Sally" and "The Newton," by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of Jally, the mate of an American merchantman, who had killed one of the crew and severely wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration held, while the Convention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment:

"Considering that it is a principle of the law of nations that every state has sovereign jurisdiction throughout its territory;

"Considering that by the terms of Article 3 of the Code Napoleon the laws of police and safety bind all those who inhabit French territory,

and that consequently foreigners, even *transeuntes*, find themselves subject to those laws;

“Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government:

“Considering that every state is interested in the repression of crimes and offences that may be committed in the ports of its territory, not only by the men of the ship’s company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship’s company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime by common law” (*droit commun*, the law common to all civilized nations), “the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory.” 1 Ortolan *Diplomatie de la Mer* (4th ed.), pp. 455, 456: Sirey (N. S.), 1859, p. 189.

*The judgment of the Circuit Court is affirmed.*<sup>1</sup>

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## COMMONWEALTH v. MANCHESTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1890.

[Reported 152 Mass. 230.]

COMPLAINT on the St. of 1886, c. 192, § 1, charging that the defendant, while commorant of Falmouth, in the county of Barnstable, at Falmouth, on July 19, 1889, “did then and there draw, set, stretch, and use a purse seine for the taking of fish in the waters of Buzzard’s Bay, within the jurisdiction of this Commonwealth.”

Trial in the Superior Court, before SHERMAN, J., who, after a verdict of guilty, reported the case for the determination of this court, in substance as follows.

The evidence introduced by the government tended to show that the defendant and others, who were citizens of Rhode Island, and were officers and crew of the fishing steamer “A. T. Serrell,” on the day alleged, were engaged in drawing, setting, stretching, and using a purse

<sup>1</sup> For cases illustrating the peculiar questions of jurisdiction arising between the state and the United States courts, see *Tennessee v. Davis*, 100 U. S. 257; *In re Coy*, 127 U. S. 731; *In re Neagle*, 135 U. S. 1; *Manchester v. Massachusetts*, 139 U. S.

seine for the taking of fish in the waters of Buzzard's Bay; that the place where the defendant and the others were so engaged was about, and not exceeding, one mile and a quarter from a point on the shore midway from the north line of the town of Falmouth to the south line thereof; that the point where they were so using said seine was within that part of Buzzard's Bay which the Harbor and Land Commissioners, acting under the provisions of section 2 of chapter 196 of the Acts of the year 1881, had, so far as they were capable of doing so, assigned to and made a part of the town of Falmouth; that the defendant and his associates, on that day and at that place, caught with a seine a large quantity of the fish called menhaden; that in so doing no fixed apparatus was used, and the bottom of the sea was not encroached upon or disturbed; that the distance between the headlands at the mouth of Buzzard's Bay, viz. at Westport in the county of Bristol on the one side, and the island of Cuttyhunk, the most southerly of the chain of islands lying to the eastward of Buzzard's Bay, and known as the Elizabeth Islands, in the county of Dukes County, on the other side, was more than one and less than two marine leagues; and that the distance across said bay at the point where the acts of the defendant were done is more than two marine leagues, and the opposite points are in different counties.

The defendant did not dispute any of the evidence offered by the government, but introduced evidence tending to show that it was impossible to discern objects across from one headland to the other at the mouth of Buzzard's Bay; that the steamer was of Newport, Rhode Island, duly enrolled and licensed at that port under the laws of the United States for carrying on the menhaden fishery; that he was in the employ of a firm engaged in the State of Rhode Island in the business of seining menhaden to be sold for bait, and to be manufactured into fish oil and fertilizer; that he was engaged in fishing for menhaden only, and caught no other fish; that menhaden is not a food fish, and is only valuable for the purpose of bait and the manufacture of fish oil and fertilizer; and that the taking of menhaden by seining does not tend in any way to decrease the quantity and variety of food fishes.

It was conceded by the government that the defendant was employed upon the vessel described by the enrolment and license, and at the time of the commission of the acts complained of he and his associates were so in the employ of the vessel described in the license; and that the defendant could not be convicted if the St. of 1865, c. 212, was not repealed by the St. of 1886, c. 192.

The defendant asked the judge to rule, that, notwithstanding the St. of 1886, c. 192, he was authorized to take menhaden by the use of the purse seine in the waters of Buzzard's Bay in the place where this act was committed; that that statute did not repeal the St. of 1865, c. 212; that the defendant might lawfully take menhaden by the use of the purse seine in Buzzard's Bay, in the place where the acts complained of were done; that the act complained of was on the high seas and



without the jurisdiction of Massachusetts, and having been done under a United States license for carrying on this fishery, the defendant could not be held as a criminal for violating a statute of this Commonwealth; that the defendant could not be held unless the act complained of was done and committed within the body of a county as understood at common law; that the statute of this Commonwealth prohibiting under a penalty the use of nets and seines, and the taking of fish within three miles of the shore, was invalid, especially as against a license to fish granted under the laws of the United States; and that on all the evidence the defendant could not be convicted.

The judge declined so to rule, and instructed the jury that the St. of 1865, c. 212, was repealed by the St. of 1886, c. 192; that if they found that the defendant was engaged in using a purse seine for the taking of fish of any kind in that part of Buzzard's Bay which was within the jurisdiction of the Commonwealth of Massachusetts, they would be authorized to convict the defendant; and that the place where the acts of the defendant were committed, being within a marine league from the shore at low-water mark, was within the jurisdiction of the Commonwealth.

*G. A. King & J. F. Jackson*, for the defendant.

*H. C. Bliss*, First Assistant Attorney-General, for the Commonwealth.

FIELD, C. J. The defendant was complained of for taking fish by the use of a purse seine in the waters of Buzzard's Bay, within the jurisdiction of this Commonwealth. It appears by the report, that the point in Buzzard's Bay where the seine was used "was within that part of Buzzard's Bay which the Harbor and Land Commissioners, acting under the provisions of section 2 of chapter 196 of the Acts of the year 1881, had, so far as they were capable of doing so, assigned to and made a part of the town of Falmouth"; that the distance between the headlands at the mouth of Buzzard's Bay is "more than one and less than two marine leagues;" and that "the distance across said bay at the point where the acts of the defendant were done is more than two marine leagues, and the opposite points are in different counties." The place "was about, and not exceeding, one mile and a quarter from a point on the shore midway from the north line of the town of Falmouth to the south line" of said town. Buzzard's Bay lies wholly within the territory of Massachusetts, having Barnstable County on the one side, and the counties of Bristol and Plymouth on the other. The defendant offered evidence that he was fishing for menhaden only, with a purse seine, and that the bottom of the sea "was not encroached upon or disturbed," and that "it was impossible to discern objects across from one headland to the other at the mouth of Buzzard's Bay;" that he was a citizen of the State of Rhode Island, and that the vessel upon which he was employed, and in connection with which he was using the seine, belonged to Newport, in that State, and had been "duly enrolled and licensed at that port under the laws of the United States for carrying on the menhaden fishery."

It was contended at the trial, among other things, that the St. of 1886, c. 192, under which the complaint was made, had not repealed the St. of 1865, c. 212; but this has not been argued in this court. It is plain that the St. of 1886, c. 192, was intended to regulate the whole subject of using nets or seines for taking fish in the waters of Buzzard's Bay, and that by implication it repealed the St. of 1865, c. 212, so far as that statute related to the taking of menhaden by the use of a purse seine in the waters of that bay. The principal question argued here is, whether the place where the acts of the defendant were done was within the jurisdiction of the Commonwealth of Massachusetts.

The Pub. Sts. c. 1, §§ 1, 2, are as follows: "Section 1. The territorial limits of this Commonwealth extend one marine league from its sea-shore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shore line. Section 2. The sovereignty and jurisdiction of the Commonwealth extend to all places within the boundaries thereof; subject to the rights of concurrent jurisdiction granted over places ceded to the United States." The Pub. Sts. c. 22, § 1, contain the following provision: "The boundaries of counties bordering on the sea shall extend to the line of the Commonwealth, as defined in section one of chapter one." Section 11 of the same chapter is as follows: "The jurisdiction of counties separated by waters within the jurisdiction of the Commonwealth shall be concurrent upon and over such waters." The St. of 1881, c. 196, which has been referred to, is as follows: "Section 1. The boundaries of cities and towns bordering upon the sea shall extend to the line of the Commonwealth, as the same is defined in section one of chapter one of the General Statutes. Section 2. The Harbor and Land Commissioners shall locate and define the courses of the boundary lines between adjacent cities and towns bordering upon the sea, and upon arms of the sea, from high-water mark outward to the line of the Commonwealth, as defined in said section one, so that the same shall conform as nearly as may be to the course of the boundary lines between said adjacent cities and towns on the land; and they shall file a report of their doings, with suitable plans and exhibits, showing the boundary lines of any town by them located and defined, in the registry of deeds in which deeds of real estate situated in such town are required to be recorded, and also in the office of the Secretary of the Commonwealth." Sections 1 and 2 of chapter 1 of the General Statutes contain the provisions which have been before recited, as now contained in the Pub. Sts. c. 1, §§ 1, 2, and c. 22, §§ 1, 11. These provisions were first enacted by the St. of 1859, c. 289. Section 1 of the Rev. Sts. c. 1, was as follows: "The sovereignty and jurisdiction of the Commonwealth extend to all places within the boundaries thereof; subject only to such rights of concurrent jurisdiction as have been or may be granted over any places ceded by the Commonwealth to the United States." The

boundaries of the Commonwealth on the sea were first exactly defined by the St. of 1859, c. 289. The boundaries of the territory granted by the charter of the Colony of New Plymouth, or of the territory included in the Province Charter, need not be particularly set forth. Buzzard's Bay was undoubtedly within the territory described in those charters.

By the definitive treaty of peace between the United States of America and Great Britain, "His Britannic Majesty acknowledges the said United States, viz. New Hampshire, Massachusetts Bay, . . . to be free, sovereign, and independent States; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, propriety, and territorial rights of the same, and every part thereof." 8 U. S. Sts. at Large, 81. If Massachusetts had become an independent nation, there can be no doubt, we think, that her boundaries on the sea, as she has defined them by the statutes, would be acknowledged by all foreign nations, and that her right to control the fisheries within these boundaries would be conceded. It has often been a matter of controversy how far a nation has a right to control the fisheries on its sea-coast, and in the bays and arms of the sea within its territory; but the limits of this right have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than six geographical miles apart, have always been regarded as a part of the territory of the nation in which they lie. More extensive rights in these respects have been and are now claimed by some nations; but, so far as we are aware, all nations concede to each other the right to control the fisheries within a marine league of the coast, and in bays within the territory the headlands of which are not more than two marine leagues apart.

In the proceedings of the Halifax Commission, under the Treaty of Washington of May 8, 1871, where it was for the interests of the United States to claim against Great Britain, independently of treaties, as extensive rights of fishing as could be maintained, the claim was stated, in the answer on behalf of the United States, as follows: "It becomes necessary at the outset to inquire what rights American fishermen, and those of other nations, possess, independently of treaty, upon the ground that the sea is the common property of all mankind. For the purposes of fishing, the territorial waters of every country along the sea-coast extend three miles from low-water mark; and beyond is the open ocean, free to all. In the case of bays and gulfs, such only are territorial waters as do not exceed six miles in width at the mouth upon a straight line measured from headland to headland. All larger bodies of water connected with the open sea form a part of it. And whenever the mouth of a bay, gulf, or inlet exceeds the maximum width of six miles at its mouth, and so loses the character of territorial or inland waters, the jurisdictional or proprietary line for the purpose of excluding foreigners from fishing is measured along the shore of the bay according to its sinuosities, and the limit of exclusion

is three miles from low-water mark." Documents and Proceedings of the Halifax Commission (Washington, 1878), Vol. I. p. 120 (45th Cong. 2d Sess., H. R. Ex. Doc., No. 89). The government of Canada had been instructed by the government of Great Britain, on April 12, 1866, "that American fishermen should not be interfered with, either by notice or otherwise, unless found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839;" but afterwards the British government issued instructions "that the United States fishermen will not be for the present prevented from fishing, except within three miles of land, or in bays which are less than six miles broad at the mouth." Vol. I. pp. 120, 121. It is true that Mr. Dana, of counsel for the United States, contended, in argument with reference to the right to fish in the open sea, "that the deep-sea fisherman, pursuing the free-swimming fish of the ocean with his net or his leaded line, not touching shores or troubling the bottom of the sea, is no trespasser, though he approach within three miles of a coast, by any established recognized law of all nations." Vol. II. p. 1654. This contention, however, did not touch the right to fish in bays or arms of the sea, and it was not the claim actually made by the United States before the Commission. This is stated in the answer and in the brief of the United States. The answer does not allude to any such position as that taken by Mr. Dana in his closing argument, but in the brief it is said: "Many authorities maintain that whenever, under the law of nations, any part of the sea is free for navigation, it is likewise free for fishing by those who sail over its surface. But, without insisting upon this position, the inevitable conclusion is, that prior to the Treaty of Washington the fishermen of the United States, as well as those of all other nations, could rightfully fish in the open sea more than three miles from the coast, and could also fish at the same distance from the shore in all bays more than six miles in width, measured in a straight line from headland to headland." Vol. I. p. 166.

The counsel for the defendant in the case at bar place much reliance upon the decision in *The Queen v. Keyn*, 2 Ex. D. 63. In that case, the defendant was the officer in command of the "Franconia," a German steamer, which, at a point "one mile and nine tenths of a mile S. S. E. from Dover pier-head, and within two and a half miles from Dover beach," in the English Channel, ran down and sank the British steamer "Strathelyde," and one of the "Strathelyde's" passengers was drowned. The defendant was indicted in the Central Criminal Court for manslaughter. The question was whether the offence was committed within the jurisdiction of the admiralty, the Central Criminal Court having jurisdiction to hear and determine any offence alleged "to have been committed on the high seas or other places within the jurisdiction of the Admiralty of England" (p. 100). A majority of the court held that the offence was committed on the German steamer,

and not on the British steamer; and that, under the laws then existing, there was no admiralty jurisdiction over an offence committed by a foreigner on a foreign ship on the open sea, whether within or without a marine league from the shore of England. In consequence of this decision, Parliament passed the St. of 41 and 42 Vict. c. 73. By that Act it was declared that, "for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast, measured from low-water mark, shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

It is obvious that by this decision the court did not attempt to define the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only the extent of the existing admiralty jurisdiction over offences committed on the open sea. The courts of England would undoubtedly enforce any Act of Parliament conferring upon them jurisdiction over offences committed anywhere. It is equally obvious that the decision has nothing to do with the right of control over fisheries in the open sea, or in bays or arms of the sea. The case contains a great deal of learning upon the respective limits of the common-law jurisdiction and of the admiralty jurisdiction in England over crimes, and upon the boundaries of counties in England under the laws then existing. These distinctions are immaterial in the case at bar, except with reference to the contention that the place where the acts complained of were done was within the admiralty jurisdiction of the courts of the United States. The boundaries of counties in Massachusetts may be defined by statute, and they may be made to extend over all the territory of Massachusetts, whether it be sea or land; and, if Massachusetts has a right to control the fisheries in Buzzard's Bay, offences in violation of the regulations which the State may establish can be tried in any of its courts upon which it may confer jurisdiction. It is to be noticed, however, that in all the citations contained in the different opinions given in *The Queen v. Keyn*, wherever the question of the right of fishery is referred to, it is conceded that the control to the extent at least of a marine league belongs to the nation on whose coast the fisheries are. The argument of Mr. Benjamin, of counsel for the defendant, is not contained in the report of the case; but from the statement of Mr. Justice Lindley, found on page 90 of the report, it seems that he admitted that the dominion of a State over the seas adjoining its shore existed for the purpose of protecting "its coasts from the effects of hostilities between other nations which may be at war, the protection of its revenue and of its fisheries, and the preservation of order by its police."

In *Direct United States Cable Co. v. Anglo-American Telegraph Co.* 2 App. Cas. 394, it became necessary for the Privy Council to determine whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was a part of the territory of Newfoundland, and within the jurisdiction of its legislature. It appeared that

the average width of the bay "is about fifteen miles," and the distance between the headlands is "rather more than twenty miles." Lord Blackburn, in delivering the opinion, says, at page 416: "The question raised in this case, and to which their Lordships confine their judgment, is as to the territorial dominion over a bay of configuration and dimensions such as those of Conception Bay above described. The few English common-law authorities on this point relate to the question as to where the boundary of counties ends, and the exclusive jurisdiction at common law of the Court of Admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of England, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shore." He quotes, at page 417, the well-known language of Lord Hale: "That arm or branch of the sea which lies within the *fauces terre*, where a man may reasonably discern between shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner," and comments upon its indefiniteness; and then cites the case of *Regina v. Cunningham*, Bell, C. C. 72, 86, and says, at page 419, that in this case, "this much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words, within the territory of Great Britain." Apparently he was of opinion that, by most of the text-writers on international law, Conception Bay would be excluded from the territory of Newfoundland, and the part of the Bristol Channel which in *Regina v. Cunningham* was decided to be in the county of Glamorgan would be excluded from the territory of Great Britain; but he decides that Conception Bay is a part of the territory of Newfoundland, because the British government has exercised exclusive dominion over it, with the acquiescence of other nations, and it has been declared by Act of Parliament "to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

We regard it as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast, and that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish like lobsters, or fish attached to or imbedded in the soil. The open sea within this limit is of course subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war, or for the prevention of frauds on the revenue, exercise an authority beyond this limit. We have no doubt that the British Crown will claim the ownership of the soil in the bays

and in the open sea adjacent to the coast of Great Britain, to at least this extent, whenever there is any occasion to determine the ownership. The authorities are collected in Gould on Waters, Part I. cc. 1, 2, and notes. See also Neill *v.* Duke of Devonshire, 8 App. Cas. 135; Gammell *v.* Commissioners of Woods and Forests, 3 Macq. 419; Mowat *v.* McFee, 5 Sup. Ct. of Canada, 66; The Queen *v.* Cubitt, 22 Q. B. D. 622; St. 46 & 47 Vict. c. 22.<sup>1</sup>

## DIRECT UNITED STATES CABLE CO. *v.* ANGLO-AMERICAN TELEGRAPH CO.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1877.

[*Reported 2 Appeal Cases, 394.*]

LORD BLACKBURN.<sup>2</sup> . . . Conception Bay lies on the eastern side of Newfoundland, between two promontories, the southern ending at Cape St. Francis, and the northern promontory at Split Point. No evidence has been given, nor was any required, as to the configuration and dimensions of the bay, as that was a matter of which the court could take judicial notice.

On inspection of the Admiralty chart, the following statement, though not precisely accurate, seems to their Lordships sufficiently so to enable them to decide the question:—

The bay is a well-marked bay, the distance from the head of the bay to Cape St. Francis being about forty miles, and the distance from the head of the bay to Split Point being about fifty miles. The average width of the bay is about fifteen miles, but the distance from Cape St. Francis to Split Point is rather more than twenty miles.

The appellants have brought and laid a telegraph cable to a buoy more than thirty miles within this bay. The buoy is more than three miles from the shore of the bay, and in laying the cable, care has been taken not at any point to come within three miles of the shore, so as to avoid raising any question as to the territorial dominion over the ocean within three miles of the shore. Their Lordships therefore are not called upon to express any opinion on the questions which were recently so much discussed in the case of *Reg. v. Keyn* (the “*Franconia*” case).

The question raised in this case, and to which their Lordships confine their judgment, is as to the territorial dominion over a bay of configuration and dimensions such as those of Conception Bay above described.

<sup>1</sup> The remainder of the opinion discusses the right of jurisdiction as between the State and the United States. Affirmed, *Manchester v. Massachusetts*, 139 U. S. 210. — Ed.

<sup>2</sup> Only so much of Lord BLACKBURN’S opinion is given as deals with the jurisdiction over Conception Bay. — Ed.

The few English common-law authorities on this point relate to the question as to where the boundary of counties ends, and the exclusive jurisdiction at common law of the Court of Admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of England, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shore.

The earliest authority on the subject is to be found in the grand abridgment of Fitzherbert "*Corone*," 399, whence it appears that in the 8 Edw. II., in a case in Chancery (the nature and subject-matter of which does not appear), Staunton, J., expressed an opinion on the subject. There are one or two words in the common printed edition of Fitzherbert which it is not easy to decipher or translate, but subject to that remark this is a translation of the passage: "*Nota per Staunton, J., that that is not [sañce which Lord Coke translates 'part'] of the sea where a man can see what is done from one part of the water and the other, so as to see from one land to the other; that the coroner shall come in such case and perform his office, as well as coming and going in an arm of the sea, there where a man can see from one part to the other of the [a word not deciphered], that in such a place the country can have consuance, etc.*"

That is by no means definite, but it is clear Staunton thought some portions of the sea might be in a county, and within the jurisdiction of the jury of that county, and at that early time, before cannon were in use, he can have had in his mind no reference to cannon shot.

Lord Coke recognizes this authority, 4th Institute, 140, and so does Lord Hale. The latter, in his treatise, *De Jure Maris*, p. 1. c. 4, uses this language: "That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner. Edward II., *Corone*, 399."

Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or discerning. If it means to see what men are doing, so, for instance, that eye-witnesses on shore could say who was to blame in a fray on the waters resulting in death, the distance would be very limited; if to discern what great ships were about, so as to be able to see their manœuvres, it would be very much more extensive; in either sense it is indefinite. But in *Reg. v. Cunningham*, Bell's Cr. C. 86, it did become necessary to determine whether a particular spot in the Bristol Channel, on which three foreigners on board a foreign ship had committed a crime, was within the county of Glamorgan, the indictment having, whether necessarily or not, charged the offence as having been committed in that county.

The Bristol Channel, it is to be remembered, is an arm of the sea



dividing England from Wales. Into the upper end of this arm of the sea the River Severn flows. Then the arm of the sea lies between Somersetshire and Glamorganshire, and afterwards between Devonshire and the counties of Glamorgan, Carmarthen, and Pembroke. It widens as it descends, and between Port Eynon Head, the lowest point of Glamorganshire, and the opposite shore of Devon it is wider than Conception Bay: between Hartland Point, in Devonshire, and Pembroke it is much wider. The case reserved was carefully prepared. It describes the spot where the crime was committed as being in the Bristol Channel, between the Glamorganshire and Somersetshire coasts, and about ten miles or more from that of Somerset. It negatived the spot being in the River Severn, the mouth of which, it is stated, was proved to be at King's Road, higher up the Channel, and was to be taken as the finding of the jury. It also showed that the spot in question was outside Penarth Head, and could not therefore be treated as within the smaller bay formed by Penarth Head and Lavernock Point. And it set out what evidence was given to prove that the spot had been treated as part of the county of Glamorgan, and the question was stated to be whether the prisoners were properly convicted of an offence within the county of Glamorgan. The case was much considered, being twice argued, and Chief Justice Cockburn delivered judgment, saying: "The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed, forms part of the body of the county of Glamorgan, and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on the one side, and the county of Glamorgan on the other. We are of opinion that looking at the local situation of this sea it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holms between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff, and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded. We are therefore of opinion that the place in question is within the body of the county of Glamorgan." The case reserved in *Cunningham's Case*, incidentally states that it was about ninety miles from Penarth Roads (where the crime was committed) to the mouth of the Channel, which points to the headlands in Pembroke and Hartland Point in Devonshire, as being the fauces of that arm of the sea. It was not, however, necessary for the decision of *Cunningham's Case* to determine what was the entrance of the Bristol Channel, further than that it was below the place where the crime was committed; and though the language used in the judgment

is such as to show that the impression of the court was that at least the whole of that part of the Channel between the counties of Somerset and Glamorgan was within those counties, perhaps that was not determined. But this much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words within the territory of Great Britain. It also shows that usage and the manner in which that portion of the sea had been treated as being part of the county was material, and this was clearly Lord Hale's opinion, as he says not that a bay is part of the county, but only that it may be.

Passing from the Common Law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbors, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose.

It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg. v. Cunningham*, Bell's Cr. C. 72, was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable.

It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country

would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland.

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### SEAGROVE v. PARKS.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION. 1891.

[Reported [1891] 1 Q. B. 551.]

APPEAL from a refusal of DENMAN, J., at chambers, to give leave to serve a writ out of the jurisdiction.

It appeared from the affidavit used in support of the application that the defendant was a naval officer on board H.M.S. "Cockatrice," appointed to the Mediterranean station, and that at the time of the application the ship was on the high seas. There were certain coaling ports at which the ship would touch, and in due course she would put into Malta, the chief port on the station. It was stated that leave had been granted by Vaughan Williams and Lawrance, JJ., respectively at chambers, in similar applications by the plaintiffs in actions against other officers on board ships on the Mediterranean station, the orders giving leave to serve the writ "at Malta or elsewhere in the Mediterranean." The application in the present case was refused by DENMAN, J., upon the ground that, as the defendant was on the high seas at the time of the application, the affidavit did not sufficiently show, nor could it be shown, "in what place or country such defendant is or probably may be found," as required by Order XI., r. 4. The plaintiffs appealed.

*Montague Lush*, for the plaintiffs.

PER CURIAM (CAVE and CHARLES, JJ.). The decision must be affirmed. As long as the defendant is on board his ship, he is within the jurisdiction, and Order XI. is unnecessary and inapplicable. If it is sought to serve him out of the jurisdiction, upon his quitting his ship, the affidavit does not comply with the requirements of Order XI., r. 4.

*Appeal dismissed.*

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### FORBES v. COCHRANE.

KING'S BENCH. 1824.

[Reported 2 Barnwell & Cresswell, 418.]

THE declaration stated that the plaintiff was lawfully possessed of a certain cotton plantation, situate in parts beyond the seas, to wit, in East Florida, of large value, and on which plantation he employed

divers persons, his slaves or servants. The first count charged the defendants with enticing the slaves away. The second count stated, that the slaves or servants having wrongfully and against the plaintiff's will, quitted and left the plantation and the plaintiff's service, and gone into the power, care, and keeping of the defendants; they, knowing them to be the slaves or servants of the plaintiff, wrongfully received the slaves into their custody, and harbored, detained, and kept them from the plaintiff's service. The last count was for wrongfully harboring, detaining, and keeping the slaves or servants of the plaintiff after notice given to the defendants that the slaves were the plaintiff's property, and request made to the defendants by the plaintiff to deliver them up to him: plea, not guilty. At the trial before ABBOTT, C. J., at the London sittings after Trinity term, 1822, a verdict was found for the plaintiff, damages £3800, subject to the opinion of the court on the following case.

The plaintiff was a British merchant in the Spanish provinces of East and West Florida, where he had carried on trade for a great many years, and was principally resident at Pensacola in West Florida. East and West Florida were part of the dominions of the king of Spain, and Spain was in amity with Great Britain. The plaintiff, before and at the time of the alleged grievances, was the proprietor and in the possession of a cotton plantation, called San Pablo, lying contiguous to the river St. John's, in the province of East Florida, and of about one hundred negro slaves whom he had purchased, and who were employed by him upon his plantation. The river St. John's is about thirty or forty miles from the confines of Georgia, one of the United States of America, which is separated from East Florida by the river St. Mary, and Cumberland Island is at the mouth of the river St. Mary on the side next Georgia, and forms part of that State. During the late war between Great Britain and America, in the month of February, 1815, the defendant, Vice-Admiral Sir Alexander Inglis Cochrane, was commander-in-chief of His Majesty's ships and vessels on the North American station. The other defendant, Rear-Admiral Sir George Cockburn, was the second in command upon the said station, and his flag-ship was the "Albion." The British forces had taken possession of Cumberland Island, and at that time occupied and garrisoned the same. The "Albion," "Terror Bomb," and others of His Majesty's ships of war, formed a squadron under Sir George Cockburn's immediate command off that island, where the headquarters of the expedition were.<sup>1</sup>

In the night of the 23d February, 1815, a number of the plaintiff's slaves deserted from his said plantation, and on the following day thirty-eight of them were found on board the "Terror Bomb," part of the squadron at Cumberland Island, and entered on her muster-books as refugees from St. John's. On the 26th of the same month of February, Sir George Cockburn received from the plaintiff a memorial. The plaintiff prayed "that the defendant, Sir G. Cockburn, would order

<sup>1</sup> The statement of facts is condensed by omitting unnecessary facts. — ED.

the said thirty-eight slaves to be forthwith delivered to him their lawful proprietor." Sir G. Cockburn told him he might see his slaves, and use any arguments and persuasions he chose to induce them to return. The plaintiff accordingly endeavored to persuade them to go back to his plantation, and no restraint was put upon them, but they refused to go. The plaintiff then urged his claim very strongly to Sir G. Cockburn, and said he must get redress if he did not succeed in prevailing upon Sir G. Cockburn to order them back again, which Sir G. Cockburn said he could not do, because they were free agents and might do as they pleased, and that he could not force them back.

HOLROYD, J.<sup>1</sup> I am also of opinion, that the plaintiff is not entitled to maintain the present action. The declaration alleges, that the plaintiff was the proprietor, and in the possession of a cotton plantation lying contiguous to the river St. John's, in East Florida, on which land he employed divers persons, his slaves or servants. The plaintiff, therefore, claims a general property in them as his slaves or servants, and he claims this property, as founded, not upon any municipal law of the country where he resides, but upon a general right. This action is therefore founded upon an injury done to that general right. Now it appears, from the facts of the case, that the plaintiff had no right in these persons, except in their character of slaves, for they were not serving him under any contract; and, according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature. I do not mean to say that particular circumstances may not introduce a legal relation to that extent; but assuming that there may be such a relation, it can only have a local existence, where it is tolerated by the particular law of the place, to which law all persons there resident are bound to submit. Now if the plaintiff cannot maintain this action under the general law of nature, independently of any positive institution, then his right of action can be founded only upon some right which he has acquired by the law of the country where he is domiciled. If he, being a British subject, could show that the defendant, also a British subject, had entered the country where he, the plaintiff, was domiciled, and had done any act amounting to a violation of that right to the possession of slaves which was allowed by the laws of that country, I am by no means prepared to say that an action might not be maintained against him. The laws of England will protect the rights of British subjects, and give a remedy for a grievance committed by one British subject upon another, in whatever country that may be done. That, however, is a very different case from the present. Here, the plaintiff, a British subject, was resident in a Spanish colony, and perhaps it may be inferred, from what is stated in the special case, that, by the law of that colony, slavery was tolerated. I am of opinion, that, according to the principles of the English law, the right to slaves, even in a country where

<sup>1</sup> The arguments of counsel, the opinion of BAYLEY, J., and part of the opinion of BEST, J., are omitted. — Ed.

such rights are recognized by law, must be considered as founded not upon the law of nature, but upon the particular law of that country. And, supposing that the law of England would give a remedy for the violation of such a right by one British subject to another (both being resident in and bound to obey the laws of that country) still the right to these slaves being founded upon the law of Spain, as applicable to the Floridas, must be co-extensive with the territories of that State. I do not mean to say, that if the plaintiff having the right to possess these persons as his slaves there, had taken them into another place, where, by law, slavery also prevailed, his right would not have continued in such a place, the laws of both countries allowing a property in slaves. The law of slavery is, however, a law *in invitum*; and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country, without doing any wrongful act. This has been decided to be the law with respect to a person who has been a slave in any of our West India colonies, and comes to this country. The moment he puts his foot on the shores of this country, his slavery is at an end. Put the case of an uninhabited island discovered and colonized by the subjects of this country; the inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail, until altered by the King in council; but in the case of the newly discovered country, freedom would be as much the inheritance of the inhabitants and their children, as if they were treading on the soil of England. Now, suppose a person who had been a slave in one of our own West India settlements, escaped to such a country, he would thereby become as much a freeman as if he had come into England. He ceases to be a slave in England, only because there is no law which sanctions his detention in slavery; for the same reason, he would cease to be a slave the moment he landed in the supposed newly discovered island. In this case, indeed, the fugitives did not escape to any island belonging to England, but they went on board an English ship (which for this purpose may be considered a floating island), and in that ship they became subject to the English laws alone. They then stood in the same situation in this respect as if they had come to an island colonized by the English. It was not a wrongful act in the defendants to receive them, quite the contrary. The moment they got on board the English ship there was an end of any right which the plaintiff had by the Spanish laws acquired over them as slaves. They had got beyond the control of their master, and beyond the territory where the law recognizing them as slaves prevailed. They were under the protection of another power. The defendants were not subject to the Spanish law, for they had never entered the Spanish territories,

either as friends or enemies. The plaintiff was permitted to see the men, and to endeavor to persuade them to return; but in that he failed. He never applied to be permitted to use force; and it does not appear that he had the means of doing so. I think that Sir G. Cockburn was not bound to do more than he did; whether he was bound to do so much it is unnecessary for me to say. It was not a wrongful act in him, a British officer, to abstain from using force to compel the men to return to slavery. It does not appear that he prevented force being used. I do not say that he might not have refused, but in fact there was no refusal. I have given my opinion upon this question, supposing that there would be a right of action against these defendants, if a wrong had actually been done by them, but I am by no means clear, that even under such circumstances, any action would have been maintainable against them by reason of their particular situation as officers acting in discharge of a public duty, in a place *flagrante bello*. I doubt whether the application ought not to have been made in such a case to the governing powers of this country for redress. The cases from the Admiralty Courts are distinguishable from the present, upon the grounds already stated by my Brother BAYLEY. In *Madrazo v. Willes*, 3 B. & Ald. 353, the plaintiff was a Spanish subject, and by the law of Spain slavery and the trade in slaves being tolerated, he had a right, by the laws of his own country, to exercise that trade. The taking away the slaves was an active wrong done in aggression upon rights given by the Spanish law. That is very different from requiring, as in this case, an act to be done against the slaves, who had voluntarily left their master. When they got out of the territory where they became slaves to the plaintiff and out of his power and control, they were, by the general law of nature, made free, unless they were slaves by the particular law of the place where the defendant received them. They were not slaves by the law which prevailed on board the British ship of war. I am, therefore, of opinion, that the defendants are entitled to the judgment of the court.

BEST J. The question is, were these persons slaves at the time when Sir G. Cockburn refused to do the act which he was desired to do? I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a British man-of-war, not lying within the waters of East Florida (where, undoubtedly, the laws of that country would prevail), those persons who before had been slaves, were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognized by the local law, they have broken their chains, they have escaped from their prison, and are free. These men, when on board an English ship, had all the

rights belonging to Englishmen, and were subject to all their liabilities. If they had committed any offence they must have been tried according to English laws. If any injury had been done to them they would have had a remedy by applying to the laws of this country for redress. I think that Sir G. Cockburn did all that he lawfully could do to assist the plaintiff; he permitted him to endeavor to persuade the slaves to return; but he refused to apply force. I think that he might have gone further, and have said that force should not be used by others; for if any force had been used by the master or any person in his assistance, can it be doubted that the slaves might have brought an action of trespass against the persons using that force? Nay, if the slave, acting upon his newly recovered right of freedom, had determined to vindicate that right, originally the gift of nature, and had resisted the force, and his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, according to our laws, be guilty of murder? That is substantially decided by *Sommersett's case*, from which, it is clear, that such would have been the consequence had these slaves been in England; and so far as this question is concerned, there is no difference between an English ship and the soil of England; for are not those on board an English ship as much protected and governed by the English laws as if they stood upon English land? *Judgment for the defendants.*<sup>1</sup>

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### McDONALD v. MALLORY.

COURT OF APPEALS, NEW YORK. 1879.

[*Reported* 77 N. Y. 546.]

RAPALLO, J.<sup>2</sup> For the purposes of this appeal the wrongful act or neglect causing the death of the plaintiff's intestate must be treated as having been committed upon the high seas. The complaint does not specifically allege that the disaster was caused by the unlawful or negligent lading of the petroleum on board of the vessel in the port of New York, and consequently the question whether that fact, if alleged, would establish that the wrong complained of was committed within the territorial bounds of this State, need not be considered.

We shall therefore come directly to the principal point argued, which is, whether under the statute of this State, which gives a right of action for causing death by wrongful act or neglect, an action can be maintained for thus causing a death on the high seas, on board of a vessel hailing from and registered in a port within this State and owned by citizens thereof; the person whose death was so caused

<sup>1</sup> See *Madrazo v. Willes*, 3 B. & Ald. 353. — Ed.

<sup>2</sup> The opinion only is given; it sufficiently states the case. — Ed.



being also a citizen of this State, the vessel being at the time employed by the owners in their own business, and their negligence being alleged to have caused the death.

It is settled by the adjudications of our own courts that the right of action for causing death by negligence exists only by virtue of the statute, and that where the wrong is committed within a foreign State or country, no action therefor can be maintained here, at least without proof of the existence of a similar statute in the place where the wrong was committed. (*Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Crowley v. Panama R. R. Co.*, 30 Barb. 99; *Beach v. Bay State Steamboat Co.*, 30 id. 433; *Vandever v. N. Y. and New Haven R. R. Co.*, 27 id. 244.) These decisions rest upon the plain ground that our statute can have no operation within a foreign jurisdiction, and that with respect to positive statute law it cannot be presumed that the laws of other States or countries are similar to our own. (Opinion of Demo, J., 23 N. Y. 467, 468, 471.) The liability of a person for his acts depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one State or country for a personal injury may be enforced in another to which the parties may remove or where they be found, yet the right or liability must exist under the laws of the place where the act was done. Actions for injuries to the person committed abroad are sustained without proof in the first instance of the *lex loci*, upon the presumption that the right to compensation for such injuries is recognized by the laws of all countries. But this presumption cannot apply where the wrong complained of is not one of those thus universally recognized as a ground of action, but is one for which redress is given only by statute.

Keeping these principles in view it is clear that in order to maintain this action it is necessary to establish that the statute law in question was operative on board of the vessel upon which the injury was committed. In all the cases which have been decided, the place of the injury was actually within the limits of a foreign territory, subject to its own laws, and where there could be no claim that the laws of this State or country were operative. In the present case the *locus in quo* was not within the actual territorial limits of any State or nation, nor was it subject to the laws of any government, unless the rule which exists from necessity is applied, that every vessel on the high seas is constructively a part of the territory of the nation to which she belongs, and its laws are operative on board of her. In this respect the case is new.

There can be no question that if this case were one arising under the laws of the United States the rule referred to would apply, and acts done on board of her while on the high seas would be governed by those laws. The question now presented is whether in respect to matters not committed by the Constitution exclusively to the Federal government nor legislated upon by Congress, but regulated entirely

by State laws, the State to which the vessel belongs can be regarded as the sovereignty whose laws follow her until she comes within the jurisdiction of some other government.

This precise question arose in the case of *Kelly v. Crapo* (45 N. Y. 86; and 16 Wall. 610), though in a different form. The question there was whether a vessel upon the high seas was subject to the insolvent laws of the State of Massachusetts, to which State the vessel belonged, that is, where she was registered and her owner resided, so that by operation of those laws, and without any act of the owner, the title to the vessel could be transferred while she was at sea by a proceeding *in invitum*, to an official assignee, and his title thus acquired would take precedence of an attachment levied upon her in the State of New York after she had come within this State.

It was conceded in that case, in this court as well as in the Supreme Court of the United States, that unless the vessel was actually or constructively within the jurisdiction of the State of Massachusetts her insolvent law could not operate upon her so as to defeat a title acquired under the laws of the State within whose actual territorial jurisdiction she afterwards came. (16 Wall. 622.) But in support of the title of the assignee in insolvency it was urged that the rule before referred to applied to her, and that while at sea she was constructively a part of the territory of the State of Massachusetts and subject to her laws.

This court held that the rule invoked was not applicable to a State, and State laws, but that the jurisdiction referred to was vested in the government of the United States, and that the national territory and its laws only were extended by legal fiction to vessels at sea.

This decision was reversed by the Supreme Court of the United States (*Crapo v. Kelly*, 16 Wall. 610), and as we understand the prevailing opinion in that court, it holds that the relations of a State to the Union do not affect its *status* as a sovereign, except with respect to those powers and attributes of sovereignty which have by the Constitution been transferred to the government of the United States, and that in all other respects it stands as if it were an independent sovereign State, unconnected with the other States of the Union. Upon this principle it was held that the vessel while at sea was constructively part of the territory of the State of Massachusetts and subject to its laws. (16 Wall. 623, 624, 631-632.) It is difficult to conceive any other principle upon which that conclusion could have been reached.

In respect to crimes committed on the high seas, the power to provide for their punishment has been delegated to the Federal government, and for that reason State laws cannot be applicable to them; but I cannot escape the conclusion that under the principle of the case of *Crapo v. Kelly* civil rights of action, for matters occurring at sea on board of a vessel belonging to one of the States of the Union must depend upon the laws of that State, unless they arise out of some matter over which jurisdiction has been vested in and exercised by the government of the United States, or over which the State has

transferred its rights of sovereignty to the United States; and that to this extent the vessel must be regarded as part of the territory of the State, while in respect to her relations with foreign governments, crimes committed on board of her, and all other matters over which jurisdiction is vested in the Federal government, she must be regarded as part of the territory of the United States and subject to the laws thereof.

The facts alleged in the complaint, and admitted by the demurrer, present a strong case for the application of the rule that the laws of the State to which the vessel belongs follow her until she comes within some other jurisdiction. The defendants, by whom the wrong is alleged to have been committed, were, at all times up to its final consummation by the death of the plaintiff's intestate, citizens and residents of this State, and subject to its laws, and the deceased was also a citizen of this State. The death was caused either by the illegal and negligent act done in this State of lading the dangerous and prohibited article on board the vessel and sending the deceased to sea in her thus exposed, or by the negligence or wrongful acts of the defendants committed at sea through their agents. The complaint does not distinctly specify which, but it must have been one or the other. If the latter, then, at the place where the injury was consummated there was no law by which to determine whether or not it rendered the defendants liable to an action, unless the law of the State to which the vessel belonged followed her. In the present case the defendants were, at the time of the wrongful act or neglect, and of the injury, within this State and subject to its laws, and none of the objections, suggested in the various cases which have been cited, to subjecting them to liability under the statute, for acts done out of the territory of the State, can apply. There can be no double liability, as suggested by Denio, J., in 23 N. Y. 467, 471, for the *locus in quo* was not subject to the laws of any other country; nor can it be said that the deceased or his representatives were under the protection of the laws of any other government, as is said in some of the other cases cited. It is a case where no confusion or injustice can result from the application of the principle declared by the Supreme Court, that the laws of the State as well as of the United States, enacted within their respective spheres, follow the vessel when on the high seas. In the opinion of the court at General Term in this case it is expressly conceded that both the laws of the State and the nation have dominion on a vessel on the high seas, but the demurrer was sustained on the ground that this right of jurisdiction has not been exercised by the State of New York, and its statutes are restricted in their operation to the actual territorial bounds of the State.

No such restriction is contained in the statute now under consideration. Its language is broad and general and by its terms it operates in all places. Its operation on cases arising in other States and countries has not been denied by reason of anything contained in

the act itself or in any other legislative act, but on general principles of law.

But the court rests its conclusion upon the act of the Legislature of this State which defines its boundaries and declares that the sovereignty and jurisdiction of this State extends to all the places within the boundaries so declared (1 R. S. 62, 65), and it construes that act as a renunciation or abrogation of any effect which might on general principles of law be given to its statutes on board of vessels on the high seas.

We are unable to concur in this view. The act referred to was intended to define simply the actual territorial bounds of the State, and the declaration that its sovereignty and jurisdiction should extend to all places within those bounds was not intended to nor could it operate as a restriction upon subsequent legislation, nor had it any reference to such a question as that now before us. Whatever operation our laws may have on board of vessels at sea depends upon general principles, and there is nothing in the legislation of our State which places it in this respect on a different footing from any other. It is not claimed that the sovereignty and jurisdiction of this State extend to its vessels when at sea, as they do to places within its boundaries, for all purposes, such as service of process, the execution of judgments and the like, but only that when acts done at sea become the subject of adjudication here, the rights and liabilities of parties may in some cases be determined with reference to our statutes. There is nothing inconsistent with this in the act referred to, or in the assertion of sovereignty and jurisdiction for all purposes over places within the bounds of the State.

The decision of this court in *Kelly v. Crapo* is referred to as the highest evidence that this State never intended that its laws should extend to vessels on the high seas. That decision recognized the general principle that the laws of a nation do so extend, but was based upon the theory that the relation of the State to the Union was such that this attribute of sovereignty had become merged in the powers granted to the general government. But the judgment of the Supreme Court of the United States having established the contrary view, and that in matters not the subject of Federal legislation, the laws of the State follow the vessel, thus making the laws of the State and of the United States, in their respective spheres, together constitute the law of the nation to which the vessel belongs, we adopt that decision as the judgment of the tribunal to whom the ultimate determination of questions of that nature properly belongs.

There is nothing in the nature of this action which renders it exclusively the subject of Federal cognizance. The jurisdiction of the States and of the United States in the matter of personal torts committed at sea, such as assaults by a master on his crew, injuries to passengers, and the like, are concurrent, though remedies by proceedings *in rem* can be administered only by the Courts of Admiralty of the

United States. The field of legislation in respect to cases like the present one has not been occupied by the general government and is therefore open to the States. (*Steamboat Co. v. Chase*, 16 Wall. 522, 530, 533.) Indeed the United States Court of Admiralty would have no jurisdiction in such a case (*Steamboat Co. v. Chase*, 16 Wall. 522, 530, 533; *Sherlock v. Allen*, 93 U. S. 99), and there is no greater objection to extending the operation of a statute of this description to a vessel at sea than there was to giving similar operation to a State insolvent law.

The judgment of the court below should be reversed, and judgment rendered for the plaintiff on the demurrer, with leave to the defendants to answer on payment of costs within thirty days.

All concur, except ANDREWS, J., absent.

*Judgment accordingly.*<sup>1</sup>

## REGINA v. ANDERSON.

CROWN CASE RESERVED. 1868.

[*Reported 11 Cox C.C. 198.*]

CASE reserved by Byles, J., at the October Sessions of the Central Criminal Court, 1868, for the opinion of this court.

James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia. She was registered in London, and was sailing under the British flag.

At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offence about three hundred yards from the nearest shore, the river at that place being about half a mile wide.

The tide flows up to the place and beyond it.

No evidence was given whether the place was or was not within the limits of the port of Bordeaux.

It was objected for the prisoner that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the court had no jurisdiction to try him.

I expressed an opinion unfavorable to the objection, but agreed to grant a case for the opinion of this court.

The prisoner was convicted of manslaughter.

J. BARNARD BYLES.

*Acc. Crapo v. Kelly*, 16 Wall. 610. And see to the same effect a decision of the Court of Cassation, Turin (Italy), April 14, 1880, (8 *Chunet*, 551): a Sicilian sailor on a vessel registered in Lombardy is subject to a section of the Penal Code which is in force in Lombardy, but not in Sicily.—Ed.

BOVILL, C. J.<sup>1</sup> There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which the local authorities of that realm might have enforced if so minded; but at the same time, in point of law, the offence was also committed within British territory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From the passage in the treatise of Ortolan, already quoted, it appears that, with regard to offences committed on board of foreign vessels within the French territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace of the port; and several instances where that course was adopted are mentioned. Among these are two cases where offences were committed on board American vessels — one at the port of Antwerp, and the other at Marseilles — and where, on the local authorities interfering, the American court claimed exclusive jurisdiction. As far as America herself is concerned, it is clear that she, by the statutes of the 23rd of March, 1825, has made regulations for persons on board her vessels in foreign parts, and we have adopted the same course of legislation. Our vessels must be subject to the laws of the nation at any of whose ports they may be, and also to the laws of our country, to which they belong. As to our vessels when going to foreign parts we have the right, if we are not bound, to make regulations. America has set us a strong example that we have the right to do so. In the present case, if it were necessary to decide the question on the 17 & 18 Vict. c. 104, I should have no hesitation in saying that we now not only legislate for British subjects on board of British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now. Independently of that statute, the general law is sufficient to determine this case. Here the offence was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or not. If the offence had been committed on the high seas it is clear that it would have been within the jurisdiction of the Admiralty, and the Central Criminal Court has now the same extent of jurisdiction. Does it make any

<sup>1</sup> Arguments of counsel and the concurring opinions of CHANNELL, B., and BLACKBURN and LUSH, JJ., are omitted. — ED.

difference because the vessel was in the river Garonne half-way between the sea and the head of the river? The place where the offence was committed was in a navigable part of the river below bridge, and where the tide ebbs and flows, and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the Admiralty jurisdiction, and it is the same as if the offence had been committed on the high seas. On the whole I come to the conclusion that the prisoner was amenable to the British law, and that the conviction was right.

BYLES, J. I am of the same opinion. I adhere to the opinion that I expressed at the trial. A British ship is, for the purposes of this question, like a floating island; and, when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and therefore of the Central Criminal Court, and the offender is as amenable to British law as if he had stood on the Isle of Wight and committed the crime. Two English and two American cases decide that a crime committed on board a British vessel in a river like the one in question, where there is the flux and reflux of the tide, and wherein great ships do hover, is within the jurisdiction of the Admiralty Court; and that is also the opinion expressed in Kent's Commentaries. The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it. I give no opinion on the question whether the case comes within the enactment of the Merchant Shipping Act.<sup>1</sup>

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VAUGHAN, C. J., in *CRAW v. RAMSEY*, Vaughan 274 (1670). One of my brothers . . . said England and Ireland were two distinct kingdoms, and no otherways united than because they had one Sovereign. Had this been said of Scotland and England it had been right, for they are both absolute kingdoms, and each of them *sui juris*. But Ireland far otherwise; for it is a dominion belonging to the crown of England, and follows that it cannot be separate from it but by Act of Parliament of England, no more than Wales, Guernsey, Jersey, Berwick, the English Plantations, all which are dominions belonging to the realm of England, though not within the territorial dominion or realm of England, but follow it and are a part of its royalty. . . . Wales, after the conquest of it by Edward the First, was annexed to England, *jure proprietatis* 12 Ed. 1, by the Statute of Ruthland only, and after more really by 27 H. 8 c. 26; but at first received laws from England as Ireland did; but not proceeded by writs out of the English Chancery, but had a Chancery of his own, as Ireland hath; was not bound by the laws of England, unnamed, until 27 H. 8, no more than Ireland now is. Ireland in nothing differs from it but in having a Parliament *gratia Regis*, subject to the Parliament of England. It might have

<sup>1</sup> See *Reg. v. Lopez*, 7 Cox C. C. 431; *Reg. v. Armstrong*, 13 Cox C. C. 181. — ED.

*Omit to*

had so, if the King pleased, but it was annexed to England. None doubts Ireland as conquer'd as it, and as much subject to the Parliament of England if it please.

VAUGHAN, C. J., WILDE and ARCHER, JJ., in the same case (2 Ventris 1). Ireland was a conquered kingdom, the conquest completed, if not begun, in King Henry the Second's time; in whose time there is no record of any establishment. And being a Christian king they remained governed by their own laws, until King John (*anno 12 regni sui*) by Charter (for so they conceived it to be, and not by Parliament; for it appears that the nobles were sworn, which is not usual in Acts of Parliament, neither is it *Teste Rege in Parlamento*) introduced the English laws. Yet it ever hath remained a distinct kingdom, viz. from the bringing in the laws by King John, M. Paris Hist. 230, and Calvin's Case in 7 Co. 22. 23; the Conquest brought it *infra dominium Regis, sed non infra Regnum Angliæ*. Orurke committed treason in Ireland, and it was held triable by Commission, by 33 H. 8. as a treason out of the Realm. 20 H. 6. 8, the Judges here are not bound to take notice of the laws of Ireland. Fitzh. Voucher 239, a man in Ireland cannot be vouched. Anders. 262, 263, 2 Inst. 2, it is said, Magna Charta nor the Statute laws here did not extend to Ireland until Poining's Law, 10 H. 7, tho' in truth it appears to be before by 8 E. 4. cap. 10; neither are they obliged by any statute since unless named.

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### CAMPBELL v. HALL.

KING'S BENCH. 1774.

[*Reported Courper*, 204.]

THIS case was very elaborately argued four several times; and now on this day Lord MANSFIELD stated the case, and delivered the unanimous opinion of the court, as follows:

This is an action that was brought by the plaintiff, James Campbell, who is a natural born subject of this kingdom, and who, upon the 3d of March, 1763. purchased a plantation in the island of Grenada: and it is brought against the defendant William Hall, who was a collector for His Majesty of a duty of four and a half per cent upon all goods and sugars exported from the island of Grenada.<sup>1</sup>

. . . A special verdict was found, which states as follows: That the island of Grenada was taken by the British arms, in open war, from the French king. . . . The special verdict then states. . . a proclamation under the great seal, bearing date the 7th October, 1763, wherein amongst other things it is said as follows:—

Whereas it will greatly contribute to the speedy settling our said governments, of which the island of Grenada is one, that our loving subjects should be informed of our paternal care for the security of the

<sup>1</sup> Part of the opinion is omitted. — Ed.



liberties and properties of those who are and shall become inhabitants thereof: we have thought fit to publish and declare by this our proclamation, that we have in our letters patent under our great seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of the said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies, within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces of America, which are already under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the representatives of the people to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances, for the public peace, welfare, and good government of our said colonies and the inhabitants thereof, as near as may be agreeable to the laws of England, and under such regulations and restrictions, as are used in our other colonies.

The next instrument stated in the special verdict, is the letters patent under the great seal, or rather a proclamation, bearing date the 26th March, 1764; wherein, the King recites a survey and division of the ceded islands, and that he had ordered them to be divided into allotments, as an invitation to purchasers to come in and purchase upon the terms and conditions specified in that proclamation.

The next instrument stated, is the letters patent under the great seal, bearing date the 9th of April, 1764. In these letters there is a commission appointing General Melville governor, with a power to summon an assembly as soon as the state and circumstances of the island would admit, and to make laws with consent of the governor and council, with reference to the manner of the other assemblies of the king's provinces in America. This instrument is dated the 9th of April, 1764. The governor arrived in Grenada on the 14th December, 1764, and before the end of the year 1765, an assembly actually met in the island of Grenada. But before the arrival of the governor at Grenada, indeed before his departure for London, there is another instrument upon the validity of which the whole question turns, which instrument contains letters patent under the great seal, bearing date the 20th July, 1764. Wherein, the King reciting, that whereas, in Barbadoes, and in all the British Leeward Islands, there was a duty of four and an half per cent upon all sugars, etc. exported; and reciting in these words; that whereas it is reasonable and expedient, and of importance to our other sugar islands, that the like duty should take place in our said island of Grenada; proceeds thus: we have thought fit, and our royal will and pleasure is, and we do hereby, by virtue of our prerogative royal, order, direct, and appoint, that from and after the 29th day of September next ensuing the date of these presents, a duty or impost of four and an half per cent in specie, shall be raised

and paid to us, our heirs and successors, upon all dead commodities, the growth and produce of our said island of Grenada, that shall be shipped off from the same, in lieu of all customs and import duties, hitherto collected upon goods imported and exported into and out of the said island, under the authority of His Most Christian Majesty.

The special verdict then states that in fact this duty of four and an half per cent is paid in all the British Leeward Islands, and sets forth the several acts of assembly relative to these duties. They are public acts; therefore, I shall not state them; as any gentleman may have access to them; they depend upon different circumstances and occasions, but are all referable to those duties in our islands. This, with what I set out with in the opening, is the whole of the special verdict that is material to the question.

The general question that arises out of all these facts found by the special verdict, is this; whether the letters patent under the great seal, bearing date the 20th July, 1764, are good and valid to abolish the French duties; and in lieu thereof to impose the four and an half per cent duty above mentioned, which is paid in all the British Leeward Islands?

It has been contended at the bar, that the letters patent are void on two points; the first is, that although they had been made before the proclamation of the 7th October, 1763, yet the King could not exercise such a legislative power over a conquered country.

The second point is, that though the King had sufficient power and authority before the 7th October, 1763, to do such legislative act, yet before the letters patent of the 20th July, 1764, he had divested himself of that authority.

A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed, are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:

A country conquered by the British arms becomes a dominion of the King in the right of his crown; and, therefore, necessarily subject to the legislature, the Parliament of Great Britain.

The 2d is, That the conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, That the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, That the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the

place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives.

The 5th, That the laws of a conquered country continue in force, until they are altered by the conqueror; the absurd exception as to Pagans, mentioned in Calvin's case, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian æra; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.

The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament), has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as, for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.

But the present change, if it had been made before the 7th October, 1763, would have been made recently after the cession of Grenada by treaty, and is in itself most reasonable, equitable, and political; for it is putting Grenada, as to duties, on the same footing with all the British Leeward Islands. If Grenada paid more it would have been detrimental to her; if less, it must be detrimental to the other Leeward Islands: nay, it would have been carrying the capitulation into execution, which gave the people of Grenada hopes, that if any new tax was laid on, their case would be the same with their fellow subjects in the other Leeward Islands.

The only question then on this first point is. Whether the King had a power to make such change between the 10th of February, 1763, the day the treaty of peace was signed, and the 7th October, 1763? Taking these propositions to be true which I have stated; the only question is, Whether the King had of himself that power?

It is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion.

To go into the history of the conquests made by the Crown of England.

The conquest and the alteration of the laws of Ireland have been

variously and learnedly discussed by lawyers and writers of great fame, at different periods of time: but no man ever said, that the change in the laws of that country was made by the Parliament of England: no man ever said the Crown could not do it. The fact in truth, after all the researches which have been made, comes out clearly to be, as it is laid down by Lord Chief Justice Vaughan, that Ireland received the laws of England, by the charters and commands of Henry II., King John, Henry III., and he adds an *et cætera* to take in Edward I., and the subsequent kings. And he shows clearly the mistake of imagining that the charters of the 12th of John, were by the assent of a Parliament of Ireland. Whenever the first Parliament was called in Ireland, that change was introduced without the interposition of the Parliament of England; and must, therefore, be derived from the Crown.

Mr. Barrington is well warranted in saying that the statute of Wales, 12th Edward I., is certainly no more than regulations made by the King in his council, for the government of Wales, which the preamble says was then totally subdued. Though, for various political purposes, he feigned Wales to be a feoff of his crown; yet he governed it as a conquest. For Edward I. never pretended that he could, without the assent of Parliament, make laws to bind any part of the realm.

Berwick, after the conquest of it, was governed by charters from the Crown without the interposition of Parliament, till the reign of James I.

All the alterations in the laws of Gascony, Guienne, and Calais, must have been under the King's authority; because all the acts of Parliament relative to them are extant. For they were in the reign of Edward III., and all the acts of Parliament of that time are extant. There are some acts of Parliament relative to each of these conquests that I have named, but none for any change of their laws, and particularly with regard to Calais, which is alluded to as if their laws were considered as given by the Crown.

Besides the garrison, there are inhabitants, property, and trade in Gibraltar: ever since that conquest the King has made orders and regulations suitable to those who live, etc. or trade, or enjoy property in a garrison town.

The Attorney-General alluded to a variety of instances, and several very lately, in which the King had exercised legislation in Minorea: there, there are many inhabitants, much property, and trade. If it is said, that the King does it as coming in the place of the King of Spain, because their old constitution remains, the same argument holds here. For before the 7th October 1763, the original constitution of Grenada continued, and the King stood in the place of their former sovereign.

After the conquest of New York, in which most of the old Dutch inhabitants remained, King Charles II. changed the form of their constitution and political government; by granting it to the Duke of York, to hold of his crown, under all the regulations contained in the letters patent.

It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the King has a right to a legislative authority over a conquered country ; it was never denied in Westminster Hall ; it never was questioned in Parliament. Coke's report of the arguments and resolutions of the judges in Calvin's case, lays it down as clear. If a king (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom ; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament. It is plain he alludes to his own country, because he alludes to a country where there is a Parliament.

The authority also of two great names has been cited, who take the proposition for granted. In the year 1722, the assembly of Jamaica being refractory, it was referred to Sir Philip Yorke and Sir Clement Wearge, to know " what could be done if the assembly should obstinately continue to withhold all the usual supplies." They reported thus : " If Jamaica was still to be considered as a conquered island, the King had a right to levy taxes upon the inhabitants ; but if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants but by an assembly of the island, or by an Act of Parliament."

They considered the distinction in law as clear, and an indisputable consequence of the island being in the one state or in the other. Whether it remained a conquest, or was made a colony, they did not examine. I have upon former occasions traced the constitution of Jamaica, as far as there are papers and records in the offices, and cannot find that any Spaniard remained upon the island so late as the restoration ; if any, there were very few. To a question I lately put to a person well informed and acquainted with the country, his answer was, there were no Spanish names among the white inhabitants, there were among the negroes. King Charles II. by proclamation invited settlers there, he made grants of lands : he appointed at first a governor and council only : afterwards he granted a commission to the governor to call an assembly.

The constitution of every province, immediately under the King, has arisen in the same manner ; not from grants, but from commissions to call assemblies : and, therefore, all the Spaniards having left the island or been driven out, Jamaica from the first settling was an English colony, who under the authority of the King planted a vacant island, belonging to him in right of his crown ; like the cases of the island of St. Helena and St. John, mentioned by Mr. Attorney-General.

A maxim of constitutional law as declared by all the judges in Calvin's case, and which two such men, in modern times, as Sir Philip Yorke and Sir Clement Wearge, took for granted, will require some authorities to shake.

But on the other side, no book, no saying, no opinion has been cited, no instance in any period of history produced, where a doubt has been

raised concerning it. The counsel for the plaintiff no doubt labored this point from a diffidence of what might be our opinion on the second question. But upon the second point, after full consideration we are of opinion, that before the letters patent of the 20th July, 1764, the King had precluded himself from the exercise of a legislative authority over the island of Grenada.

The first and material instrument is the proclamation of the 7th October, 1763. See what it is that the King there says, with what view, and how he engages himself and pledges his word.

“For the better security of the liberty and property of those who are or shall become inhabitants of our island of Grenada, we have declared by this our proclamation, that we have commissioned our governor (as soon as the state and circumstances of the colony will admit) to call an assembly to enact laws.” etc. With what view is this made? It is to invite settlers and subjects: and why to invite? That they might think their properties, etc. more secure if the legislation was vested in an assembly, than under a governor and council only.

Next, having established the constitution, the proclamation of the 20th March, 1764, invites them to come in as purchasers: in further confirmation of all this, on the 9th April, 1764, three months before July, an actual commission is made out to the governor to call an assembly as soon as the state of the island would admit thereof. You observe, there is no reservation in the proclamation of any legislature to be exercised by the King, or by the governor and council under his authority in any manner, until the assembly should meet; but rather the contrary: for whatever construction is to be put upon it, which, perhaps, may be very difficult through all the cases to which it may be applied, it alludes to a government by laws in being, and by courts of justice, not by a legislative authority, until an assembly should be called. There does not appear from the special verdict, any impediment to the calling an assembly immediately on the arrival of the governor, which was in December, 1764. But no assembly was called then or at any time afterwards, till the end of the year 1765.

We therefore think, that by the two proclamations and the commission to Governor Melville, the King had immediately and irrecoverably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, in like manner as the other islands belonging to the King.

Therefore, though the abolishing the duties of the French King and the substituting this tax in its stead, which according to the finding in this special verdict is paid in all the British Leeward Islands, is just and equitable with respect to Grenada itself, and the other British Leeward Islands, yet, through the inattention of the King's servants, in inverting the order in which the instruments should have passed,

and been notoriously published, the last act is contradictory to, and a violation of the first, and is, therefore, void. How proper soever it may be in respect to the object of the letters patent of the 20th July, 1764, to use the words of Sir Philip Yorke and Sir Clement Wearge, "it can only now be done, by the assembly of the island, or by an act of the Parliament of Great Britain."

The consequence is, judgment must be given for the plaintiff

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DOBREE v. NAPIER.

COURT OF COMMON PLEAS. 1836.

[*Reported 2 Bingham's New Cases, 781*].

TINDAL, C. J.<sup>1</sup> The plaintiffs declare in this action against the two defendants for seizing and taking a steam vessel of the plaintiffs, and converting the same to their use.

The defendants sever in their pleading, but each puts upon the record substantially the same justification, to which the answers given by the replication are the same, and the same questions of law are raised thereon.

It will be sufficient, therefore, to consider the case as it is raised upon the pleadings with respect to the first-named defendant. Charles Napier.

The third special plea of the defendant Charles Napier alleges, that as a servant of the Queen of Portugal, and by her command, he seized and took the steam vessel of the plaintiffs as lawful prize, and that such proceedings were thereupon had, according to the laws of Portugal, in a court of law in the kingdom of Portugal of competent jurisdiction in that behalf, that afterwards, in and by the said court, the said steam vessel was adjudged to have been justly and lawfully taken, and was then in due course and form of law condemned as lawful prize, and as forfeited to the Queen of Portugal. In answer to this plea, the plaintiff in his replication alleges certain facts, which bring the service of the defendant Charles Napier under the Queen of Portugal, upon the occasion in question, within the restrictions of the statute 59 G. 3. c. 69. s. 2., generally known by the name of the Foreign Enlistment Act; and to this replication the defendant demurred.

We think it is perfectly clear, that, except for the facts introduced by the replication, the plea, standing alone and unanswered, would be a conclusive bar to the plaintiff's right of action. The sentence of a foreign court of competent jurisdiction, condemning a neutral vessel taken in war, as prize, is binding and conclusive on all the world; and

<sup>1</sup> The opinion only is given; it sufficiently states the case. Part of the opinion, involving a different question, is omitted. — Ed.

no English court of law can call in question the propriety, or the grounds, of such condemnation. It is sufficient to refer to the case of *Hughes v. Cornelius* and others, Sir T. Raym. 473, as a decisive authority on that point. It follows that after the sentence of the Court of Lisbon, it cannot be controverted in this, or any other English court, that the steam vessel was rightly taken by the Queen of Portugal as prize, and that all the property of the plaintiffs therein became, by such capture and condemnation, forfeited to the Queen, and vested in her.

But the plaintiffs contend that the replication, by the facts therein disclosed, shows that the service of the defendant Charles Napier under the Queen of Portugal, by virtue of which service alone he justifies the seizing of the steam vessel, is made illegal by an English statute, viz. the statute 59 G. 3. c. 69., and that such illegality of the service prevents him from making any justification under the Queen of Portugal, and renders him liable to all the damages which the plaintiffs have sustained by reason of the seizure. And whether the conclusion which the plaintiffs draw from these premises is the just conclusion or not, is the question between these parties. The seizure by the Queen of Portugal must be admitted to be justifiable; no objection can be taken against the forfeiture of the property in this vessel to the Queen, under the sentence of condemnation. The plaintiffs, therefore, in contemplation of law, have sustained no legal injury by reason of the seizure. Again no one can dispute the right of the Queen of Portugal, to appoint in her own dominions, the defendant or any other person she may think proper to select, as her officer or servant, to seize a vessel which is afterwards condemned as a prize; or can deny, that the relation of lord and servant, *de facto*, subsists between the Queen and the defendant Napier. For the Queen of Portugal cannot be bound to take any notice of, much less owe any obedience to, the municipal laws of this country. Still, however, notwithstanding the loss by seizure is such, as that no court of law can consider it an injury, or give any redress for it; and that the service and employment of the defendant is a service and employment *de facto*; the plaintiffs contend they can make the servant responsible for the whole loss, only by reason of his being obnoxious to punishment in this country, for having engaged in such service. No case whatever has been cited which goes the length of this proposition; the authorities referred to establishing only, that where an act prohibited by the law of this country has been done, the doer of such illegal act cannot claim the assistance of a court of law in this country to enforce such act, or any benefit to be derived from it, or any contract founded upon it. To the full extent of these authorities, we entirely accede; but we cannot consider the law to be, that where the act of the principal is lawful in the country where it is done, and the authority under which such act is done is complete, binding, and unquestionable there, the servant who does the act can be made responsible in the courts of this country for the consequence of such act. to the same



extent as if it were originally unlawful, merely by reason of a personal disability imposed by the law of this country upon him, for contracting such engagement. Such a construction would effect an unreasonable alteration in the situation and rights of the plaintiffs and the defendant. The plaintiffs would, without any merit on their part, recover against the servant the value of the property to which they had lost all claim and title by law against the principal; and the defendant, instead of the measure of punishment intended to be inflicted by the statute for the transgression of the law, might be made liable to damages of an incalculable amount. Again, the only ground upon which the authority of the servant is traversable at all in an action of trespass, is no more than this; to protect the person or property of a party from the officious and wanton interference of a stranger, where the principal might have been willing to waive his rights. It is obvious that the full benefit of this principle is secured to the plaintiffs by allowing a traverse of the authority *de facto*, without permitting them to impeach it by a legal objection to its validity, in another and foreign country. And we think there is no material difference between the third and the first and second special pleas on this record. For as we hold that the authority of the Queen of Portugal to be a justification of the seizure "as prize," there is as little doubt but that she might direct a neutral vessel to be seized when in the act of breaking a blockade by her established, which is the substance of the first special plea, or of supplying warlike stores to her enemies, which is the substance of the second. We therefore give judgment on the first three special pleas, for the defendants.

*Judgment for Defendants.*<sup>1</sup>

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REGINA v. LESLEY

CROWN CASE RESERVED. 1860.

[*Reported Bell*, 220; 8 *Cox C. C.* 269.]

ERLE, C. J.<sup>2</sup> In this case the question is whether a conviction for false imprisonment can be sustained upon the following facts.

The prosecutor and others, being in Chili, and subjects of that state, were banished by the government from Chili to England.

<sup>1</sup> See *Underhill v. Hernandez*, 168 U. S. 250. — Ed.

<sup>2</sup> The opinion only is given. In addition to the facts therein stated, the following may be useful:—

It appeared by the evidence for the prosecution that the prisoners requested the defendant to take them to Peru, which was near, offering to pay him what the Government of Chili paid him, but that the defendant refused, on the ground that his contract required him to carry the prisoners to Liverpool. They made no other request to be put ashore. The vessel touched at the Azores, and the defendant made holes in the boats to prevent the escape of the prisoners.

WATSON, B., who tried the case, directed a verdict of guilty, and reported the case to the Court for Crown Cases Reserved. — Ed.

*Read*

The defendant, being master of an English merchant vessel lying in the territorial waters of Chili, near Valparaiso, contracted with that government to take the prosecutor and his companions from Valparaiso to Liverpool, and they were accordingly brought on board the defendant's vessel by the officers of the government and carried to Liverpool by the defendant under his contract. Then, can the conviction be sustained for that which was done within the Chilian waters? We answer no.

We assume that in Chili the act of the government towards its subjects was lawful; and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof.

We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government and under its authority. In *Dobree v. Napier*, 2 Bing. N. C. 781, the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman seizing an English vessel, could justify the act under the employment of the Queen.

We think that the acts of the defendant in Chili become lawful on the same principle, and therefore no ground for the conviction.

The further question remains, Can the conviction be sustained for that which was done out of the Chilian territory? And we think it can.

It is clear that an English ship on the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil. In *Regina v. Sattler*, 1 D. & B. C. C. 525, this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle has been laid down by foreign writers on international law, among which it is enough to cite Ortolan, "*Sur la Diplomatie de la Mer*," liv. 2. cap. 13.

The Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 267, makes the master and seamen of a British ship responsible for all offences against property or person committed on the sea out of her Majesty's dominions as if they had been committed within the jurisdiction of the Admiralty of England.

Such being the law, if the act of the defendant amounted to a false imprisonment he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship, and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili,

yet that justification ceased when he passed the line of Chilian jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship the laws of Chili, out of the state, are powerless, and the lawfulness of the acts must be tried by English law.

For these reasons, to the extent above mentioned, the conviction is affirmed.

*Conviction confirmed accordingly.*

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LORD MANSFIELD, C. J., in *REX v. VAUGHAN*, 4 Burr. 2494, 2500 (1769). The argument is strong that these statutes do not extend to Jamaica, though they were enacted long before that island belonged to the Crown of England. If Jamaica was considered as a conquest, they would retain their old laws, till the conqueror had thought fit to alter them. If it is considered as a colony (which it ought to be, the old inhabitants having left the island), then these statutes are positive regulations of police, not adapted to the circumstances of a new colony; and therefore no part of that law of England which every colony from necessity is supposed to carry with them at their first plantation. No Act of Parliament made after a colony is planted is construed to extend to it, without express words showing the intention of the legislature to be 'that it should.'

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## SECTION II.

### THE ORIGIN AND CHANGE OF LAW.

*Read*

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## BLANKARD v. GALDY.

KING'S BENCH. 1693.

[*Reported 2 Salkeld, 411.*]

IN debt on a bond, the defendant prayed oyer of the condition, and pleaded the statute E. 6. against buying offices concerning the administration of justice; and averred, That this bond was given for the purchase of the office of provost-marshal in Jamaica, and that it concerned the administration of justice, and that Jamaica is part of the revenue and possessions of the Crown of England: The plaintiff replied,

that Jamaica is an island beyond the seas, which was conquered from the Indians and Spaniards in Queen Elizabeth's time, and the inhabitants are governed by their own laws, and not by the laws of England: The defendant rejoined, That before such conquest they were governed by their own laws; but since that, by the laws of England: Shower argued for the plaintiff, that, on a judgment in Jamaica, no writ of error lies here, but only an appeal to the Council; and as they are not represented in our Parliament, so they are not bound by our statutes, unless specially named. *Vide* And. 115. Pemberton *contra* argued, that by the conquest of a nation, its liberties, rights, and properties are quite lost; that by consequence their laws are lost too, for the law is but the rule and guard of the other; those that conquer, cannot by their victory lose their laws, and become subject to others. *Vide* Vaugh. 405. That error lies here upon a judgment in Jamaica, which could not be if they were not under the same law. *Et per* HOLT, C. J. & Cur.,

First, in case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; so it seemed to be agreed.

Secondly, Jamaica being conquered, and not pleaded to be parcel of the kingdom of England, but part of the possessions and revenue of the Crown of England, the laws of England did not take place there, until declared so by the conqueror or his successors. The Isle of Man and Ireland are part of the possessions of the Crown of England; yet retain their ancient laws: That in Davis 36. it is not pretended, that the custom of tanistry was determined by the conquest of Ireland, but by the new settlement made there after the conquest: That it was impossible the laws of this nation, by mere conquest, without more, should take place in a conquered country; because, for a time, there must want officers, without which our laws can have no force: That if our law did take place, yet they in Jamaica having power to make new laws, our general laws may be altered by theirs in particulars; also they held, that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.

*Judgment pro quer.*<sup>1</sup>

<sup>1</sup> Another report of the same case may be found in 4 Mod. 222. In that case the Court is reported to have said: "And therefore it was held, that Jamaica was not governed by the laws of England after the conquest thereof, till new laws were made: for they had neither sheriff or counties; they were only an assembly of people which are not bound by our laws, unless particularly mentioned. In Barbadoes all freeholds are subject to debts, and are esteemed as chattels till the creditors are satisfied, and then the lands descend to an heir; but the law is otherwise here; which shows that though that island is parcel of the possessions of England, yet it is not governed by the laws made here, but by their own particular laws and customs."

*Acc.* Earl Derby's Case, 2 And. 116; Mem. 2 P. Wms. 75. See *Cross v. Harrison*, 16 How. 164; *Airhart v. Massieu*, 98 U. S. 491. — ED.

**THE ADVOCATE-GENERAL OF BENGAL v. RANEE  
SURNOMOYE DOSSEE.**

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1863.

[*Reported 2 Moore's Privy Council, new series, 22.*]

THEIR Lordships' judgment was now delivered by The Right Hon. LORD KINGSDOWN.

The question in this case arises on the claim of the Crown to a portion of the personal estate of Rajah Kistonaath Roy, who destroyed himself in Calcutta on the 31st of October, 1844, and was found by inquisition to have been *felo de se*.

We understand that the Rajah had a residence in Calcutta, though his Raj, or Zemindary, was at some distance from that city. He was a Hindoo both by birth and religion.

On the morning of the day on which he destroyed himself he made a will, by which he left a large portion of his property to the East India Company for charitable purposes.

The will was disputed by his widow, who was his heiress, and a suit was instituted by her against the East India Company and others, to determine its validity. It was agreed between the litigating parties that the question should be tried by an issue at law. The widow insisted, amongst other objections, that the testator was not in a fit state of mind to make a will at the time of its execution.

The issue was tried, and a verdict was found by the judges against the will, upon what ground does not distinctly appear, and the verdict was acquiesced in by the Indian Government.

If the Crown, by virtue of the inquisition, was entitled to all the personal property of the Rajah, the validity or invalidity of the will was, as regards his personal estate, of no importance.

Now, the inquisition had found that the goods and chattels of the Rajah when he committed self-murder amounted within Calcutta to Rs. 9, 87, 063, and without the town of Calcutta to Rs. 2, 89, 500; and it stated that all his property was claimed by the widow.

No claim of any part of it appears at that time to have been set up by the East India Company on behalf of the Crown, and very large sums were from time to time, by the order, or with the consent of the Indian Government, paid over to the widow in the years 1846 and 1847.

A portion, however, of the Rajah's personal estate, amounting to between six and seven lacs of Rupees, was secured in the Supreme Court, in order to provide for the payment of life annuities to two ladies, both then living. The existence of these charges seems to have been the only reason why this fund was not transferred to the widow with the rest of the estate.

One of the annuitants is now dead, and the fund reserved to answer

her annuity is of course set free. This fund is now claimed by the Indian Government under the finding on the inquisition of 1844.

It is stated in the affidavit of a gentleman who was manager for the widow on the death of her husband, that he was advised in 1844, by three English counsel of eminence, whom he names, that the verdict on the inquisition might be set aside on the ground both of misdirection by the coroner, and as being against the weight of evidence, but that proceedings were not taken for that purpose, because the government represented, through its law agents, that no claim would ever be made under the verdict.

If the facts be such as we have stated, it is impossible not to feel some surprise at the present demand; and, if we differed from the court below, it would deserve much consideration, whether a claim which seems to have been abandoned in 1844, ought now to be entertained. But these facts do not seem to have been noticed by the judges in India; there may possibly be circumstances with which we are unacquainted to account for the course taken by the government, and we think it better to dispose of the case on the merits.

At what time then, and in what manner, did the forfeiture attached by the law of England to the personal property of persons committing suicide in that country, become extended to a Hindoo committing the same act in Calcutta?

The sum of the appellant's argument was this: that the English Criminal Law was applicable to natives as well as Europeans within Calcutta, at the time when the death of the Rajah took place, and the sovereignty of the English Crown was at that time established; that the English settlers when they first went out to the East Indies in the reign of Queen Elizabeth took with them the whole law of England, both civil and criminal, unless so far as it was inapplicable to them in their new condition; that the law of *felo de se* was a part of the criminal law of England which is not inapplicable to them in their new condition, and that it, therefore, became part of the law of the country.

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to the same laws.

But this was not the nature of the first settlement made in India — it was a settlement made by a few foreigners for the purposes of trade in a very populous and highly civilized country, under the government of a powerful Mohammedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in India they retained their own laws for their own government within the factories, which they were

permitted by the ruling powers of India to establish; but this was not on the ground of general international law, or because the Crown of England or the laws of England had any proper authority in India, but upon the principles explained by Lord Stowell in a very celebrated and beautiful passage of his judgment in the case of "The Indian Chief." (3 Rob. Adm. Rep. 28).

The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habits of European Christians that they have usually been allowed by the indulgence or weakness of the potentates of those countries to retain the use of their own laws, and their factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mohammedans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them, but they are recognized in the judgment to which we have above referred.

But, if the English laws were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. The question, therefore, and the sole question in this case is, whether by express enactment the English law of *felo de se*, including the forfeiture attached to it, had been extended in the year 1844 to Hindoos destroying themselves in Calcutta.

We were referred by Mr. Melvill, in his very able argument, to the charter of Charles II. in 1661, as the first, and indeed the only one which in express terms introduces English law into the East Indies. It gave authority to the company to appoint governors of the several places where they had or should have factories, and it authorized such governors and their council to judge all persons belonging to the said company, or that should live under them, in all causes, whether civil or criminal, according to the laws of the kingdom of England, and to execute judgment accordingly.

The English Crown, however, at this time clearly had no jurisdiction over the native subjects of the Mogul, and the charter was admitted by Mr. Melvill (as we understood him) to apply only to the European servants of the company; at all events it could have no application to the question now under consideration. The English law, civil and criminal, has been usually considered to have been made applicable to natives, within the limits of Calcutta, in the year 1726, by the charter, 13th Geo. I. Neither that nor the subsequent charters expressly declare that the English law shall be so applied, but it seems to have

been held to be the necessary consequence of the provisions contained in them.

But none of these charters contained any forms applicable to the punishment, by forfeiture or otherwise, of the crime of self-murder, and with respect to other offences to which the charters did extend, the application of the Criminal law of England to natives not Christians, to Mohammedans and Hindoos, has been treated as subject to qualifications without which the execution of the law would have been attended with intolerable injustice and cruelty.

To apply the law which punishes the marrying a second wife whilst the first is living, to a people amongst whom polygamy is a recognized institution, would have been monstrous, and accordingly it has not been so applied.

In like manner, the law, which in England most justly punishes as a heinous offence, the carnal knowledge of a female under ten years of age, cannot with any propriety be applied to a country where puberty commences at a much earlier age, and where females are not unfrequently married at the age of ten years.

Accordingly, in the case referred to in the argument, the law was held not to apply.

Is the law of forfeiture for suicide one which can be considered properly applicable to Hindoos and Mohammedans?

The grounds on which suicide is treated in England as an offence against the law, and punished by forfeiture of the offender's goods and chattels to the King, are stated more fully in the case of *Hales v. Petit*, in *Plowden's Reports*, p. 261, than in any other book which we have met with. It is there stated that it is an offence against nature, against God, and against the King. Against nature, because against the instinct of self-preservation; against God, because against the commandment, "Thou shalt not kill," and a *felo de se* kills his own soul; against the King, in that thereby he loses a subject.

Can these considerations extend to native Indians, not Christians, not recognizing the authority of the Decalogue, and owing at the time when this law is supposed to have been introduced no allegiance to the King of Great Britain?

The nature of the punishment also is very little applicable to such persons. A part of it is, that the body of the offender shall be deprived of the rites of Christian burial in consecrated ground. The forfeiture extends to chattels real and personal, but not to real estates; these distinctions, at least in the sense in which they are understood in England, not being known or intelligible to Hindoos and Mohammedans.

Self-destruction, though treated by the law of England as murder, and spoken of in the case to which we have referred in *Plowden* as the worst of all murders, is really, as it affects society, and in a moral and religious point of view, of a character very different not only from all murders but from all other felonies. These distinctions are pointed



out with great force and clearness in the notes attached to the Indian code, as originally prepared by Lord Macaulay and the other Commissioners. The truth is, that the act is one which in countries not influenced by the doctrines of Christianity has been regarded as deriving its moral character altogether from the circumstances in which it is committed: sometimes as blameable, sometimes as justifiable, sometimes as meritorious, or even an act of positive duty.

In this light suicide seems to have been viewed by the founders of the Hindoo Code, who condemn it in ordinary cases as forbidden by their religion; but in others, as in the well-known instances of Suttee and self-immolation under the car of Juggernaut, treat it as an act of great religious merit.

We think, therefore, the law under consideration inapplicable to Hindoos, and if it had been introduced by the charters in question with respect to Europeans, we should think that Hindoos would have been excepted from its operation. But that it was not so introduced appears to us to be shown by the admirable judgment of Sir Barnes Peacock in this case; and if it were not so introduced, then as regards natives, it never had any existence.

It would not necessarily follow that, therefore, it never had existed as regards Europeans. That question would depend upon this, whether, when the original settlers, under the protection of their own Sovereign, were governed by their own laws, those laws included the one now under consideration; whether an offence of this description was an offence against the King's peace, for which he was entitled to claim forfeiture; whether the factory could for this purpose be considered as within his jurisdiction. In that case it might be that the subsequent appointment of coroners by the Act of the 33rd Geo. III. would render effectual a right previously existing, but for the recovery of which no adequate remedy had been previously provided.

We are not quite sure whether the court below intended to determine this point or not. Much of the reasoning in the judgment is applicable to Europeans as well as to natives, but the Chief Justice in his judgment says: "At present we have merely to consider the question, so far as it relates to the goods and chattels of a native who wilfully and intentionally destroys himself, and who cannot in strictness be called a *felo de se*; and we now proceed to deal with that question, and with that question alone."

The point so decided we think perfectly clear, and it is not necessary to go further. Since the new code, which confines the penalty of forfeiture within much narrower limits than existed previously to its enactment, and does not extend it to the property of persons committing suicide, the case can hardly again arise.

We have no doubt that it is our duty in this case humbly to advise Her Majesty to dismiss the appeal, with costs.

## COMMONWEALTH v. CHAPMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1848.

[Reported 13 Metcalf, 68.]

SHAW, C. J. This was an indictment against the defendants for a false and malicious libel, tried before the Court of Common Pleas, and, upon a conviction there, the case is brought before this court, upon an exception which has been most elaborately argued by the learned counsel for the defendants, and which, if sustained, must go to the foundation of the prosecution; namely, that there is no law of this Commonwealth by which the writing and publishing of a malicious libel can be prosecuted by indictment, and punished as an offence. The proposition struck us with great surprise, as a most startling one; but as it was seriously presented and earnestly urged in argument, we felt bound to listen, and give it the most careful consideration; but after the fullest deliberation, we are constrained to say, that we can entertain no more doubt upon the point than we did when it was first offered.

It is true that there is no statute of the Commonwealth declaring the writing or publishing of a written libel, or a malicious libel, by signs and pictures, a punishable offence. But this goes little way towards settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law. It has been common to denominate this "the common law of England," because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law, by which, as English subjects, they were governed when they emigrated; or statutes made afterwards, of a general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

In addition to these sources of unwritten law, some usages, growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long had the force of law; as, for instance, the convenient practice, by which, if a married woman join with her husband in a deed conveying land of which she is seized in her own right, and simply acknowledge it before a magistrate, it shall be valid to pass her land, without the more expensive process of a fine, required by the common law. Indeed, considering all these sources of unwritten and traditionary law, it is now more accurate, instead of the common law of England, which constitutes a part of it, to call it collectively the common law of Massachusetts.

To a very great extent, the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights

are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases, where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common law punishment of fine and imprisonment. Indeed, it seems to be too obvious to require argument, that without the common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law.

It will not be necessary here to consider at large the sources of the unwritten law, its authority as a binding rule, derived from long and general acquiescence, its provisions, limits, qualifications, and exceptions, as established by well authenticated usage and tradition. It is sufficient to refer to 1 Bl. Com. 63 *et seq.*

If it be asked, "How are these customs or maxims, constituting the common law to be known, and by whom is their validity to be determined?" Blackstone furnishes the answer; "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study," "and from being long personally accustomed to the judicial decisions of their predecessors." 1 Bl. Com. 69.

Of course, in coming to any such decision, judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness.

That there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law, seems not seriously contested in the argument before us. But it is urged that, in the range and scope of this unwritten law, there is no provision which renders the writing or publishing of a malicious libel punishable as a criminal offence.

The stress of the argument of the learned counsel is derived from a supposed qualification of the general proposition in the constitution or

Massachusetts, usually relied on in proof of the continuance in force of the rules and principles of the common law, as they existed before the adoption of the constitution. The clause is this: Chap. 6, Art. 1, Sect. 6: "All the laws which have been adopted, used, and approved in the province, colony, or state of Massachusetts Bay and usually practised on in the courts of law, shall still remain and be in full force until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."

It is then argued, that it is in virtue of this clause of the constitution that the common law of England, and all other laws existing before the revolution, remain in force, and that this clause so far modifies the general proposition, that no laws are saved, but those which have been actually applied to cases in judgment in a court of legal proceeding; and unless it can be shown affirmatively that some judgment has been rendered, at some time before the adoption of the constitution, affirmative of any particular rule or principle of the common law, such rule is not brought within the saving power of this clause, and cannot therefore be shown to exist. We doubt the soundness of this proposition, and the correctness of the conclusion drawn from it.

We do not accede to the proposition, that the present existence and effect of the whole body of law, which existed before the constitution, depends solely upon this provision of it. We take it to be a well-settled principle, acknowledged by all civilized states governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties, and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority. Indeed, the existence of this body of laws, and the social and personal rights dependent upon them, from 1776, when the Declaration of Independence was made, and our political revolution took place, to 1780, when this constitution was adopted, depend on this principle. The clause in the constitution, therefore, though highly proper and expedient to remove doubts, and give greater assurance to the cautious and timid, was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one. We think, therefore, it should have such a construction as best to carry into effect the great principle it was intended to establish.

But further; we think the argument is unsound in assuming that no rule of the common law can be established under this clause of the constitution, without showing affirmatively, that in some judicial proceeding, such rule of law has been drawn in question and affirmed, previously to the adoption of the constitution. During that time there were no published report of judicial proceedings. The records of courts were very imperfectly kept, and afford but little information in

regard to the rules of law discussed and adopted in them. And who has examined all the records of all the criminal courts of Massachusetts, and can declare that no records of such prosecutions can be found? But so far as it regards libel, as a criminal offence, we think it does appear, from the very full and careful examination of the late Judge Thatcher (*Commonwealth v. Whitmarsh*, Thatcher's Crim. Cases, 441), that many prosecutions for libel were instituted in the criminal courts before the Revolution, and none were ever quashed or otherwise disposed of, on the ground that there was no law rendering libels punishable. In the case of the indictments returned against Governor Gage and others, very much against the will of the judges, those indictments were received and filed, and remained, until *non prossed* by the king's attorney-general. This investigation of the history of the common law of Massachusetts is so thorough, complete, and satisfactory, that it is sufficient to refer to it, as a clear elucidation of the subject.

But we think there is another species of evidence to prove the existence of the common law, making libel an offence punishable by law, clear, satisfactory, and decisive; and that is, these rules of law, with some modification, caused by the provisions of the constitution, have been affirmed, declared, and ratified by the judiciary and the legislative departments of the existing government of Massachusetts, by those whose appropriate province and constitutional duty it was to act and decide upon them; so that they now stand upon a basis of authority which cannot be shaken, and must so stand until altered or modified by the legislature.

When our ancestors first settled this country, they came here as English subjects; they settled on the land as English territory, constituting part of the realm of England, and of course governed by its laws; they accepted charters from the English government, conferring both political powers and civil privileges; and they never ceased to acknowledge themselves English subjects, and never ceased to claim the rights and privileges of English subjects, till the Revolution. It is not therefore, perhaps, so accurate to say that they established the laws of England here, as to say, that they were subject to the laws of England. When they left one portion of its territory, they were alike subject, on their transit and when they arrived at another portion of the English territory; and therefore always, till the Declaration of Independence, they were governed and protected by the laws of England, so far as those laws were applicable to their state and condition. Under this category must come all municipal laws regulating and securing the rights of real and personal property, of person and personal liberty, of habitation, of reputation and character, and of peace. The laws designed for the protection of reputation and character, and to prevent private quarrels, affrays, and breaches of peace, by punishing malicious libel, were as important and as applicable to the state and condition of the colonists as the law punishing violations of the

rights of property, of person, or of habitation; that is, as laws for punishing larceny, assault and battery, or burglary. Being part of the common law of England, applicable to the state and condition of the colonists, they necessarily applied to all English subjects and territories, as well in America as in Great Britain, and so continued applicable till the Declaration of Independence.

This, therefore, would be evidence, *a priori*, that they were in force, and were adopted by the clause cited from the constitution, except so far as modified by the excepting clause.

That the law of libel existed, at the first migration of our ancestors, and during the whole period of the colonial and provincial governments, is proved by a series of unquestionable authorities.<sup>1</sup>

*Exceptions overruled.*

*omit to 86*

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EMERSON, J., in *FIRST NATIONAL BANK v. KINNER*, 1 Utah, 100 (1873). In *American Ins. Co. v. Canter*, 1 Pet. 511, the court, by Judge Marshall, say, substantially, that the laws of Florida, as they were when the Territory was ceded, so far as not inconsistent with the Constitution and Laws of the United States, continued in force until altered by the newly created power of the State. (See, also, *United States v. Powers*, 11 How. 570; *Strothers v. Lucas*, 12 Pet. 410, 436.) This appears to be the settled doctrine in regard to conquered and ceded Territory in the absence of special treaty stipulation. It applies to territory acquired from Mexico, since the treaty of Guadalupe made no special provision on the subject. Utah was embraced in that acquisition. As in Florida the pre-existing law was Spanish, so in Utah, it was Mexican, and in both cases the laws were derived mainly from the laws of Rome. In neither did the English common law, or the Statute of Frauds, prevail. Congress made no special change, and the Territorial Legislature, upon whom authority was conferred, have made no express enactment upon the subject.

This Territory was first settled in 1847, and from that time up to the acquisition and treaty in 1848, the settlers were comparatively few in number. There were no settled laws, usages, and customs among them. They came here as American citizens, under the flag, and claiming the protection of the United States Government.

The particular class of persons forming the great, if not the entire bulk of emigrants, claim to have furnished troops from among their own numbers to assist this Government in its war against Mexico.

At the time of the acquisition and treaty, they could not claim Mexican citizenship, and have never adopted its laws and customs.

Soon after the change of sovereignty by the treaty, emigrants in

<sup>1</sup> The learned Chief Justice proceeded to show that these authorities had been followed in Massachusetts since the adoption of the constitution. — Ed.

large numbers flocked in from the States and surrounding Territories, and for many years there has been an organized community.

When we turn to the communities from whence these emigrants proceeded, we find that they differed one from another, more or less, in regard to their laws and institutions. No two are alike. In the most, it is true, many common-law principles and doctrines were in force. Still the body of the common law in each was peculiar to the particular State, and it was rather the common law of the State than the English common law. In some, the English statutes had been received as common law; in others, not.

These diversities make it impossible to assume that any specific body of the common law was transplanted to the Territory<sup>1</sup> by the fact of immigration.

But one course was open, and that was for the whole body of the people to agree, expressly or tacitly, upon a common measure. It was to be expected that the emigrants would not be contented with the loose and alien institutions of an outlying Mexican department, and they have not been.

They have tacitly agreed upon maxims and principles of the common law suited to their conditions and consistent with the Constitution and Laws of the United States, and they only wait recognition by the courts to become the common law of the Territory. When so recognized, they are laws as certainly as if expressly adopted by the law-making power.

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### CHAPPELL v. JARDINE.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1834.

[*Reported 51 Connecticut, 64.*]

PARK, C. J.<sup>1</sup> This is a suit for the foreclosure of certain mortgaged premises, constituting an island, known as Ram Island, in Long Island Sound. The complaint alleges that the land mortgaged, at the time the deed was given, lay in the town of Southold, Suffolk County, in the State of New York, and it is averred that the mortgage was recorded in the office of the clerk of Suffolk County in that State. It is further alleged that Ram Island, by the recent establishment of the boundary line between the State of New York and this State, has become a part of the town of Stonington in this State. The complaint is demurred to, so that the averment stands admitted that the island was, when the mortgage was made, a part of the State of New York.

We have heretofore held (*Elphick v. Hoffman*, 49 Conn. 331) that the boundary agreed upon by the joint commission of the two States and established by the legislative acceptance of both States, was to be regarded as presumably a designation and establishment of the pre-

<sup>1</sup> Part of the opinion is omitted. — Ed.

existing boundary line which had become lost, and not as the establishment of a new line, leaving the matter open to proof in special cases. If we should apply that rule here, and consider the island in question as having been legally a part of this State when the mortgage was made, we should at once encounter another question of a serious nature. There can be no question that whatever has been the *de jure* jurisdiction over the island, it has been for many years within the *de facto* jurisdiction of the State of New York; and we should be compelled to determine the legal effect upon this mortgage of that *de facto* jurisdiction.

We have thought it as well, therefore, to take the case as the parties have themselves presented it, the plaintiff by the averments of his complaint and the defendants by the admissions of their demurrer, and regard the island in question as having been within the State of New York when the mortgage was made, and afterwards brought within this State by the establishment of the boundary line. Indeed as the proceeding is in error we cannot properly govern ourselves by anything but the record as it comes before us.

And in treating the island as within the State of New York when the mortgage was made we are regarding the contract and the rights of the parties under it, precisely as they themselves understood them at the time.

The mortgaged premises having been in the State of New York when the mortgage was made, it is of course to be governed in its construction and effect by the laws of that State then in force. In *McCormick v. Sullivant*, 10 Wheat. 192, the court say: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." The same doctrine is held in *United States v. Crosby*, 7 Cranch, 115, *Kerr v. Moon*, 9 Wheat. 565, *Darby v. Mayer*, 10 id. 465, and in many other cases. Indeed the doctrine is unquestioned law everywhere.

Now, according to the laws of the State of New York then and still in force, a mortgage of real estate creates a mere chose in action, a pledge, a security for the debt. It conveys no title to the property. The claim of the mortgagee is a mere chattel interest. He has no right to the possession of the property. The title and seisin remain in the mortgagor, and he can maintain trespass and ejectment against the mortgagee, if he takes possession of the property without the consent of the mortgagor. This appears clearly from the following cases.<sup>1</sup>

It follows, therefore, that while the land in question remained in the State of New York, it was incumbered by a mortgage of this character;

<sup>1</sup> The learned judge here cited and discussed the following cases: *Gardner v. Heartt*, 3 Den. 232; *Power v. Lester*, 23 N. Y. 527; *Trimm v. Marsh*, 54 N. Y. 599; *Jackson v. Willard*, 4 Johns. 42; *Astor v. Hoyt*, 5 Wend. 603; *Kortright v. Cady*, 21 N. Y. 343; *Merritt v. Bartholick*, 36 N. Y. 44. — Ed.



and when it came into this State it bore with it the same burden precisely. There was nothing in the change of jurisdiction that could affect the contract of mortgage that had been made between the parties. The title to the property continued to remain in the mortgagor, and it remains in him still. This is clear. The laws of this State could not make a new contract for the parties or add to one already made. They had to take the contract as they found it.

Now it is clear that there is no remedy by way of foreclosure known to our law which is adapted or appropriate to giving relief on a mortgage of this character. Our remedy is adapted to a mortgage deed which conveys the title of the property to the mortgagee, and when the law day has passed, the forfeiture, stated in the deed, becomes absolute at law, and vests a full and complete title in the mortgagee, with the exception of the equitable right of redemption, which still remains in the mortgagor. The object of the decree of foreclosure is, to extinguish this right of redemption if the mortgage debt is not paid by a specified time. The decree acts upon this right only. It conveys nothing to and decrees nothing in the mortgage if the debt is not paid. After the law day has passed the right of redemption becomes a mere cloud on the title the mortgagee then has, and when it is removed his title becomes clear and perfect. *Phelps v. Sage*, 2 Day, 151; *Roath v. Smith*, 5 Conn. 136; *Chamberlin v. Thompson*, 10 id. 244; *Porter v. Seeley*, 13 id. 564; *Smith v. Vincent*, 12 id. 1; *Doton v. Russell*, 17 id. 151; *Cross v. Robinson*, 21 id. 379; *Dudley v. Caldwell*, 19 id. 218; *Colwell v. Warner*, 36 id. 224.

What effect would such a decree produce upon a mortgage like the one under consideration, where the legal title remains in the mortgagor, and nothing but a pledgee's interest is in the mortgagee, even after the debt becomes due? It could only extinguish the right of redemption, if it could do that. It could not give the mortgagee the right of possession of the property, for the mortgagor has still the legal title, which carries with it the right of possession. It would require another proceeding in equity, to say the least, to dispossess him of that title, and vest it in the mortgagee. Hence it is clear that full redress cannot be given the plaintiff in this proceeding.

But the plaintiff has a lien on the property in the nature of a pledge to secure payment of the mortgage debt. And although our remedy of strict foreclosure may not be adapted to give redress to the plaintiff through the medium of such a lien, still a court of equity can devise a mode that will be appropriate; for it would be strange if a lawful lien upon property to secure a debt could not be enforced according to its tenor by a court of chancery. It is said that every wrong has its remedy; so it may be said that every case requiring equitable relief has its corresponding mode of redress. We have no doubt that a court of equity has the power to subject the property in question to the payment of this debt, upon a proper complaint adapted to the purpose. When personal property is pledged to secure the payment of a debt, it

may be taken and sold, that payment may be made, after giving the pledgor a reasonable opportunity for redemption. So here, we think a similar course might be taken with this property. Such a course would fall in with the original intent of the parties, and with the civil code and mode of procedure of the State of New York. Modes of redress in that State have of course no force in this State, but such a mode of procedure seems to be adapted to a case of this character.

And we further think that on an amended complaint, setting forth all the essential facts, and praying that if there shall be a default in redeeming the property during such time as the court shall allow for redemption, then the right of redemption shall be forever foreclosed, and the legal title and possession of the property be decreed in the mortgagee, such course might be taken.

We think either of the modes suggested might be pursued; but inasmuch as the course which has been taken leaves the legal title and possession of the property in the mortgagor, we think the court erred in holding the complaint sufficient, and in passing the decree thereon.

There is error in the judgment appealed from, and it is reversed, and the case remanded.

In this opinion the other judges concurred.

*Read*

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## MORTIMER v. NEW YORK ELEVATED RAILROAD CO.

SUPERIOR COURT OF THE CITY OF NEW YORK. 1889.

[*Reported 6 New York Supplement, 898.*]

FREEDMAN, J. The claim made in this case by and on behalf of the elevated railway companies is that the absolute fee of the street known as the "Bowery" was, prior to the surrender of the Dutch forces to the English in 1664, in the Dutch government; that such fee thereafter went to the State or to the city of New York so absolutely that abutting owners never had, and do not now have, any easement of any kind in said street, and that, the elevated railway running through the Bowery having been constructed with the consent of both the city and the State, neither its owners nor its lessees are liable for any injury inflicted upon abutting property by reason of the construction and operation of the railway.

The claim of the English that they were the owners, by right of discovery, under governmental authority, of the land of which the present city of New York forms a part, and that this gave them such exclusive ownership that the Dutch government acquired no title to the land which can be recognized, has been fully set forth in the opinion of Judge TRUAX. I concur in his remarks as far as they go, but wish to add the following, viz.:—

The claim of the English, it is true, has occasionally been criticised on the ground that neither of the Cabots landed in or near New York, or saw the coast of New York. The right of discovery is not recognized in the Roman law unless followed by occupation, or unless the intention of the sovereign or State to take possession be declared or made known to the world. And it must be conceded that modern diplomatists and publicists incline to the opinion that mere transient discovery amounts to nothing unless followed in a reasonable time by occupation and settlement, more or less permanent, under the sanction of the State. But the question in the case at bar is not to be decided according to the rules of the international law of the present time. It is a question purely between the public authorities of the State of New York and citizens of the same State, and as such it is controlled by the decisions referred to by Judge TRUAX, to the effect that what the English did do was sufficient to give them title by discovery, and that such title is superior to the Indian title. These decisions proceeded upon the theory that the claim of the Dutch was contested by the English from the very start, not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title; and that the claim of the English was finally decided in their favor by the sword. That being so, it follows that, in contemplation of present law, neither the Dutch nor the Roman law ever prevailed in the State of New York *de jure*, and that the common law of England must be deemed to be the original source of all our law. And it further follows that the foundations of the rights of owners of land abutting on a street laid out while the Dutch were in possession, as against the city or the State of New York, rest upon the English common law, and that they are not to be affected by the Dutch or Roman law.

Reported cases in which the validity of Dutch grants was upheld between individuals have no application to the present controversy. Now, under the English common law, the presumption is that the owners of lands lying on a highway are the owners of the fee of the highway; that the owners on each side of the highway own the soil of the highway in fee to the centre of the highway; and that the rights of the public in and to the highway are no higher or other than those of a mere easement. *Wager v. Railroad Co.*, 25 N. Y. 529. This presumption applies as well to the streets of a city as to a country highway. *Bissell v. Railroad Co.*, 23 N. Y. 61. This presumption of law is founded on the supposition that the way was originally granted by the adjoining owners in equal proportions. *Watrous v. Southworth*, 5 Conn. 305. But the presumption may be rebutted by proof to the contrary, and it is rebutted by the production of a deed under which the owner derives title granting the land to the side of the street only. Under the operation of this rule, and there being no proof of alienation or escheat requiring a different conclusion, it must be assumed in this case that the original grantors from whom plaintiffs'

title has been derived owned the soil of the Bowery in front of the premises in suit to the centre of the street. But even if the title of the English rested not in discovery, but in conquest, and the English, upon the surrender by the Dutch in 1664, acquired from the Dutch a title to the then existing streets as absolute as under the Roman law the title of the government to a military highway was, the fact would not improve the position of the defendants. Upon receiving such title the English could do with it what they pleased. They were not bound to enforce it against abutting owners, as the Dutch government might have enforced it. The presumption is that they took the title and the streets to be held by them according to their own laws, and as matter of fact they thereafter so dealt with said streets as to admit of no other conclusion. The province having been granted by Charles II. to his brother, the Duke of York, by the charter of 1664, several months before the surrender to Sir Richard Nicolls, the grant, in order to remove all doubt as to its validity, was afterwards confirmed by the charter of 1674, also granted to the Duke of York. The object of both charters was to enable the Duke of York to plant a colony on this continent. The charter of 1664, issued under the great seal of England, contained a provision that the statutes, ordinances, etc., to be established by the Duke in the new country, "should not be contrary to, but as nearly as might be agreeable to, the laws, statutes, and government of the realm of England." This charter was, therefore, in itself, an explicit declaration of the King's will that the laws of England should be established in the colony, and that the laws of the Dutch settlers should not be retained. The consequence was that, having obtained the lands, the English held them, not under the Dutch or the civil law, but under the common law of their own country. English law governed English land, so that, even if an absolute title to a street was obtained, the street was ever thereafter treated as an English street, under the common law.<sup>1</sup>

<sup>1</sup> The learned judge then expressed the opinion that by subsequent acts of the Proprietor and of the State the city lost its rights, if any, to the legal fee.

In his concurring opinion TRUAX, J., said: "I am of the opinion that the fee of the Bowery, and of the other streets in the city of New York that are known as Dutch streets, never was in the Dutch government; and that it was, prior to the Revolution, bound by the rules of the common law, and not by the rules of the Dutch civil law. While the Dutch were in actual possession this execution of the common law was suspended, just as, during the late Rebellion, this execution of the laws of the United States could not be enforced in some of the southern States. But, said the Supreme Court of the United States in *Ketchum v. Buckley*, 99 U. S. 188, "the same general form of government, the same general law for the administration of justice and the protection of private rights which had existed in the States prior to the Rebellion, remained during its continuance and afterwards."

See *Ketchum v. Buckley*, 99 U. S. 188, and cases cited. — ED.

## McKENNON v. WINN.

SUPREME COURT OF OKLAHOMA TERRITORY. 1893.

[Reported 1 *Oklahoma Reports*, 327.]

BURFORD, J.<sup>1</sup> The appellant filed his complaint in the court below to enforce the specific performance of a contract for the conveyance of real estate situated in Oklahoma City, Oklahoma County, Oklahoma Territory. A demurrer was filed to the complaint, alleging as grounds: *First*. That the court has no jurisdiction of the person of defendant, or the subject of the action. *Second*. That the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained, to which the appellant excepted and brings the case to this court by appeal. . . .

The second ground for demurrer presents two questions: *First*. Can a parol contract for the conveyance of real estate, or an interest therein, made after the settlement of this country, and prior to the adoption of our organic act, be enforced? *Second*. Is a contract for the conveyance of real estate, entered into before title is acquired from the United States, and to be executed after title is acquired, void, as against public policy?

The first proposition seems to be settled by the adjudicated cases and text writers in favor of the appellant. "Every contract, on whatever subject, may be in oral words, which will have the same effect as if written, except when some positive rule of the common or statutory law has provided otherwise." Bish. Cont. § 153; *Mallory v. Gillett*, 21 N. Y. 412; *Wyman v. Goodrich*, 26 Wis. 21; *Green v. Brookins*, 23 Mich. 48; *White v. Maynard*, 111 Mass. 250. By the common law, prior to the enactment of the statute of frauds (29 Car. II. c. 3, A. D. 1676), contracts for the sale of real estate, or an interest therein, were not required to be in writing. Bish. Cont. § 1231; 4 Kent Com. p. 450. The English-speaking people brought the common law to America with them, in the first settlement of the colonies; and it has prevailed in all the States and Territories, modified by legislative acts, local conditions, and such of the English statutes adopted prior to the settlement of our colonies as were of general application, and suited to our conditions, except in some portions where the French or civil law prevailed. At the time of the settlement and discovery of America the statute of frauds had not been adopted, and has only become the law of the United States, or of our several States and Territories, by legislative enactment.

This leads us to the inquiry, Did the common law prevail in the Territory in April, 1889? It is contended that prior to the settlement of Oklahoma, and until the same was superseded by statutory laws,

<sup>1</sup> Part of the opinion is omitted. — Ed.

the Code Napoleon, or civil law, prevailed. Whatever may have been the laws of the country now known as Oklahoma, they ceased to operate in the region originally comprising the Indian Territory when the Territory ceased to be a part of the Territory of Louisiana, and the laws of the Territory of Indiana and the Territory of Missouri, which may have once prevailed in said region, became inoperative in and ceased to have any force or effect in the Indian Territory, when that Territory ceased to be a part of said Territories. *Railroad Co. v. O'Loughlin*, 49 Fed. Rep. 440. There was no law in the Indian Territory regulating the making of contracts at the time of the approval of the Act of Congress establishing a United States district court in said Territory by the act of March 1, 1889. 25 Stat. 783. Congress, with the assent of the Indians, created the court for the whole of the Indian Territory, which included Oklahoma, and conferred on it jurisdiction in all civil cases between citizens of the United States who are residents of the Territory, or between citizens of the United States or of any State or Territory, and any citizen of, or person residing or found in, the Indian Territory. It gave the court authority, and imposed upon it the duty, to apply the established rules and principles of the common law to the adjudication of those cases of which it was given jurisdiction. *Pyeatt v. Powell*, 51 Fed. Rep. 551. But if it be held that the establishment of a United States court in the Indian Territory did not put the common law in force in said Territory, except in so far as was necessary to execute the powers of said court, and for the adjudication of such cases as actually went into that forum, then there was no law in Oklahoma, at the date of its settlement, regulating the making of contracts. If this should be conceded, then it necessarily follows, on principle, that when people from all parts of the United States, on the 22d day of April, 1889, settled the country known as Oklahoma, built cities, towns, and villages, and began to carry on trade and commerce in all its various branches, they brought into Oklahoma, with them, the established principles and rules of the common law, as recognized and promulgated by the American courts, and as it existed when imported into this country by our early settlers, and unmodified by American or English statutes. So that, in any event, the common law prevailed in Oklahoma at the time the contract between the appellant and appellee was entered into; and as, at common law, contracts for the sale and conveyance of real estate were not required to be in writing, the contract mentioned in the complaint may be enforced, unless void for other reasons.<sup>1</sup>

<sup>1</sup> The contract was held not to be void on the ground alleged: the court followed on this point *Lamb v. Davenport*, 18 Wall. 307. — Ed.

*Panama v. Rock*  
Read 45 Sup. Ct. Rep. 58

## SECTION III.

## CONCURRENT LEGISLATIVE JURISDICTION.

## MATTHEWS v. BURDETT.

QUEEN'S BENCH. 1703.

[Reported 2 Salkeld, 412.]

IN the primitive church, the laity were present at all synods. When the empire became Christian, no canon was made without the Emperor's consent; the Emperor's consent included that of the people, he having in himself the whole legislative power, which our kings have not. Therefore, if the King and clergy make a canon it binds the clergy *in re ecclesiastica*, but it does not bind laymen: they are not represented in Convocation; their consent is neither asked nor given.<sup>1</sup>

## SELIM FARAG v. DAME ROSINA MARDROUS ET AL.

COURT OF APPEAL OF ALEXANDRIA (EGYPTIAN MIXED COURT). 1894.

19 *Juris. des Trib. de la Réforme*, 231.

THE Armenian Catholic Patriarch of Constantinople on August 23, 1886, and on November 18, 1887 pronounced a judicial separation between Selim Farag and his wife, and condemned him to pay her 33,000 francs damages and 300 francs a month alimony. One Back, a creditor of Mrs. Farag, made a judicial seizure of the sum thus due from Selim Farag. On January 20, 1891, after due notice, Selim Farag appealed from the decision of the Patriarch to the Holy See; and the Congregation *de propaganda fide*, to which the matter was referred, by a decision of June 27, 1892 (approved by the Pope the same day), reversed both sentences of the Patriarch.<sup>2</sup>

THE COURT. It will not be seriously questioned that if, as a result of the decision of the Holy Court of Rome, the sentences of the Patriarch have been made void, all the rights which Mrs. Farag or those claiming under her asserted as a result of the sentences also became void: since the original title on which they were based has become null and without effect. The fundamental questions are therefore whether the Holy See exceeded the limits of its jurisdiction, and whether its decisions have binding force in Turkey.

<sup>1</sup> See 21 E. 4. 44. pl. 6. — Ed.

<sup>2</sup> This short statement of facts has been slightly altered in form from the statement of the court. Part of the opinion, upon a point of procedure, has been omitted. — Ed.

On the first point, the Pope is the head of the Catholic Church. His jurisdiction extends directly over all bishops for the maintenance of the unity of the faith and the discipline; he is, as the Council of the Vatican proclaims, the Supreme judge of the faithful. They may appeal to him in all cases which are within the ecclesiastical jurisdiction; his sovereign power extends over the churches of the Orient as well as over all other churches in the whole world. By a recent bull of July 20, 1883, addressed to the Patriarchs, Archbishops, and Bishops of the Oriental rites, the Congregation *de propaganda fide* has reminded them of this fundamental rule of jurisdiction, especially with regard to matrimonial causes: "To harmonize the rigorous observance of the Canon Law in this very important matter with the special conditions of the Ecclesiastical Courts of the Orient, appeals ought to be taken in the following order: if the first judgment has been given in the Diocesan Court, appeal shall be taken to the Patriarchal Court; and if judgment is given in the Patriarchal Court, appeal shall be taken to the Holy See." (Chap. IV., § 24). As to the Armenian Catholic Patriarch of Constantinople, in particular, before he was proclaimed in the Consistory of August 4, 1881, Patriarch of Cilicia under the name of Peter IV., Mgr. Stephen Azarian had addressed to His Holiness Leo XIII. the profession of faith and obedience to the Holy See, which he had pronounced before the Synod in the form prescribed by Urban VIII., and submitted himself to the authority of the Roman Church in all things touching the faith, the discipline, and the administration of his patriarchate. There is no doubt, therefore, that in granting the appeal of Selim Farag against the decisions of the Patriarch, and in setting them aside, the Holy See has acted within the bounds of its jurisdiction and its powers.

On the second point, far from disowning the authority and the right of jurisdiction of the heads of religious communities established in the Orient, the Sublime Porte has for a long time granted to these communities the most absolute right of conforming to the rules and rites of their religion. In such a spirit were promulgated the Hatti Humayoum on February 18, 1856, the organic rule of the Supreme Court of Constantinople on 8 Zilhedje, 1284, and the law of the Vilayets in 1867. The idea and intention of the Sublime Porte are made still clearer by its spontaneous declaration in the Treaty of Berlin on July 13, 1878; in which it is said that "the Sublime Porte having expressed the wish to maintain the principle of religious liberty and give it the widest extension," it has been stipulated that "the liberty and the open practice of all cults are assured to every one, and no hindrance shall be placed in the way either of the hierarchical organization of the different communities or of their relations to their spiritual heads."

The Berat of the Sultan, dated 21 Gamad Akher, 1303, accrediting the Patriarch Azarian after the confirmation of his election by the Holy See, inspired by the same principles, expressly imposes upon the Patriarch respect and observance of the laws of his church, orders that the



Christians of his communion shall be judged in accordance with the rules of their rite and the laws of their religion, and makes the observance and respect of these laws by the Patriarch the condition of his continuance during his life. The constant practice of the Catholic Patriarchates of the Orient, Syriac, Chaldee, Copt, Maronite, Armenian, and Latin, has certainly been to render legal decisions in the name of the Pope, and to take appeals to him, without any opposition on the part of the local authorities or of the Sublime Porte. It is only necessary to read the circulars of February 3 and April 1, 1891, to be convinced that the Sublime Porte, in decreeing that in future the decisions of the Patriarchates should be executed like the other judgments of the country, without any foreign intervention, had no other aim than to put such decisions beyond the reach of objections brought by the defendants before the local courts charged with the execution of judgments, and to give the Patriarch alone jurisdiction to pass upon the objections. One might therefore rely upon these circulars to establish the doctrine that the Patriarch's decisions are in future sovereign, and beyond all appeal except to the superior jurisdiction of the Holy See.

The decision of the Holy See, which has set aside the two sentences of the Armenian Catholic Patriarch of Constantinople, has in Turkey therefore, the authority of a sovereign judgment, and had the immediate effect of quite avoiding the two sentences. Back and the heirs of Mardrous cannot in addition invoke the authority of the judgment of this court, January 29, 1891, and the Court of Cairo, January 28, 1892, which declared regular and valid the suits against Farag by virtue, and in execution of the Patriarchal sentences; for these judgments were given before the Papal decision, which in setting aside the Patriarchal sentences has at the same time as necessary consequence avoided all the effects of the supposed *res judicata*. It is in fact a principle of the Courts of the Reform that the setting aside or reversal of a judgment in any legal way caused the avoidance of the execution and of all decisions based on the judgment; *cessante causa, cessat effectus*.

## PAPAYANNI v. RUSSIAN STEAM NAVIGATION CO.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1863.

[Reported 2 Moore's Privy Council Cases, New Series, 161.]

THIS was an appeal from two judgments in an action and cross-action, being a claim and counter-claim, respecting damage by collision off the Island of Marmora, whereby the steamer "Colchide" was lost, pronounced by the Judge of the Supreme Consular Court at Constantinople. The appellants were British subjects domiciled in England, and owners of the "Laconia." The respondents were Russian subjects, "The Russian Steam Navigation and Trading Company," a public company, incorporated by an Imperial ukase of His Majesty

the Emperor of Russia, and were the owners of the steamship, "Colchide." . . . The appellants entered a protest against the jurisdiction of the Supreme Consular Court to entertain the cause of collision, it being a proceeding *in rem*.<sup>1</sup>

Their Lordships' judgment was pronounced by

DR. LUSHINGTON. In considering what power and what jurisdiction was conceded to Great Britain within certain portions of the Turkish dominions, it must always be borne in mind that in almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an Oriental and a Christian State and the intercourse between two Christian nations.

This is an undoubted fact. Many of the reasons are obvious, but this is not the occasion for discussing them. It is sufficient for us to know and acknowledge that such is the fact.

It is true beyond all doubt that, as a matter of right, no State can claim jurisdiction of any kind within the territorial limits of another independent State. It is also true that between two Christian States all claims for jurisdiction of any kind, or exemption from jurisdiction, must be founded on treaty, or engagements of similar validity. Such, indeed, were factory establishments for the benefit of trade. But though, according to the laws and usages of European nations, a cession of jurisdiction to the subjects of one State within the territory of another, would require, generally at least, the sanction of a treaty, it may by no means follow that the same strict forms, the same precision of treaty obligation, would be required or found in intercourse with the Ottoman Porte.

It is true, as we have said, that if you inquire as to the existence of any particular privileges conceded to one State in the dominions of another, you would, amongst European nations, look to the subsisting treaties; but this mode of incurring obligations, or of investigating what has been conceded, is matter of custom and not of natural justice.

Any mode of proof by which it is shown that a privilege is conceded is, according to the principles of natural justice, sufficient for the purpose. The formality of a treaty is the best proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof; and more especially in transactions with Oriental States.

Consent may be expressed in various ways: by constant usage permitted and acquiesced in by the authorities of the State, active assent, or silent acquiescence, where there must be full knowledge.

We, having considered the materials before us, entertain no doubt that, so far as relates to the Ottoman Government, no objection is tenable against the exercise of jurisdiction between British and Russian subjects. Indeed, the objection, if any such could properly be urged, should come from the Ottoman Government rather than a

<sup>1</sup> The remainder of the statement of facts, the arguments of counsel, and part of the opinion are omitted.—ED.

British suitor, who, in this case, is bound by the law established by his own country. The case may, in some degree, be assimilated to the violation of neutral territory by a belligerent; the neutral State alone can complain.

We think, looking at the whole of this case, that so far as the Ottoman Government is concerned, it is sufficiently shown that they have acquiesced in allowing to the British Government a jurisdiction, whatsoever be its peculiar kind, between British subjects and the subjects of other Christian States. It appears to us that the course was this: that at first, from the total difference of religious habits and feelings, it was necessary to withdraw as far as practicable British subjects from the native courts; then in the progress of time commerce increasing, and various nations having the same interest in abstaining from resort to the tribunals of Mussulmans, etc., recourse was had to Consular Courts; and by degrees the system became general. Of all this the Government of the Ottoman Porte must have been cognizant, and their long acquiescence proves consent. The principles are fully explained in the celebrated judgment of Lord Stowell in the case of "*The Indian Chief*" (3 C. Rob. 28), to which we have very recently referred (*Advocate-General of Bengal v. Ranee Surnomoye Dossee*, 2 Moo. P. C. 22, 60).

Though the Ottoman Porte could give and has given to the Christian Powers of Europe authority to administer justice to their own subjects, according to their own laws, it neither has professed to give nor could give to one such Power any jurisdiction over the subjects of another Power. But it has left those Powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign and that of the Sovereign to whose tribunals they resort. There is no compulsory power in an English Court in Turkey over any but English subjects; but a Russian or any other foreigner may, if he pleases, voluntarily resort to it with the consent of his Sovereign, and thereby submit himself to its jurisdiction.

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#### IN RE ROSS.

SUPREME COURT OF THE UNITED STATES. 1890.

[*Reported 140 United States Reports, 453.*]

THE petitioner below, the appellant here, was imprisoned in the penitentiary at Albany in the State of New York. He was convicted on the 20th of May, 1880, in the American consular tribunal in Japan, of the crime of murder, committed on board of an American ship in the harbor of Yokohama in that empire, and sentenced to death.

On the 6th of August following, his sentence was commuted by the President to imprisonment for life in the penitentiary at Albany, and

to that place he was taken, and there he has ever since been confined. Nearly ten years afterwards, on the 19th of March, 1890, he applied to the Circuit Court of the United States for the Northern District of New York for a writ of *habeas corpus* for his discharge, alleging that his conviction, sentence, and imprisonment were unlawful, and stating the causes thereof and the attendant circumstances. The writ was issued, directed to the superintendent of the penitentiary, who made return that he held the petitioner under the warrant of the President. . . .

FIELD, J.<sup>1</sup> The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offences. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an

<sup>1</sup> Part of the opinion only is given. — Ed.

undue accusation or an unfair trial, secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tri

bunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. Letter of Mr. Cushing to Mr. Calhoun of September 29, 1844, accompanying President's message communicating abstract of treaty with China, Senate Doc. 58, 28th Cong. 2d Sess.; Letter on Judicial Exterritorial Rights by Secretary Frelinghuysen to Chairman of Senate Committee on Foreign Relations of April 29, 1882, Senate Doc. 89, 47th Cong. 1st Sess.; Phillimore on Int. Law, vol. 2, part 7; Halleck on Int. Law, c. 41. . . .

### FICHERA *v.* DE STRENS.

BELGIAN CONSULAR COURT, CAIRO. 1887.

[*Reported 16 Clunet*, 141.]

THE COURT. The Constitution of February 7, 1831, cannot guarantee to Belgian citizens the enjoyment of their constitutional rights outside the limits of the national territory. It cannot have the effect of granting liberty of worship, of the press, of speech, and of assemblage in countries which cannot tolerate such liberty. Therefore, the special measures of protection which are the corollary of it, like trial by jury in crimes concerning the press, cannot be invoked in the case of acts committed in a foreign country.

One cannot rely upon the fiction of extritoriality to argue that the crime imputed to the accused should be considered as having been committed in Belgium; for this fiction cannot be pressed beyond its object, which is, in penal matters, as much to secure the repression of crimes committed by Belgians in a country outside Christendom as to protect them from vexatious prosecutions by foreign governments. The theory of incompetence set up by the accused would, on the contrary, render the repression of crimes of the press illusory and impossible; for to deal justly with such an affair it is necessary to take account of the personality of the parties to the cause and of the polemical habits of the local press, things which cannot be wisely appreciated by judges who are entire strangers to the place where the alleged libels were published. . . .<sup>1</sup>

On principle, citizens of a country residing abroad, whatever may be their political and constitutional rights elsewhere, are subject to the criminal laws of the foreign country where they live. There is, it is true, an exception when countries outside Christendom are concerned, but this exception results, not from the Constitution, but from the diplomatic conventions and the special laws which exclusively govern it. So far as concerns Belgian citizens, this special law is the consular law of December 31, 1851; by the terms of Art. 27 of this law, the Consular Court has cognizance of *all* crimes committed within

<sup>1</sup> The court here held that no Belgian court had jurisdiction. — ED.

the limits of the consulate. It makes no distinction between ordinary crimes and crimes of the press; no mention at all is made of a special procedure for crimes of this sort.

The plea to the jurisdiction is overruled.

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### ROUET v. SCHIFF.

COURT OF CASSATION, FRANCE. 1891.

[*Reported Journal du Palais*, 1891, 721.]

M. ROUET, a French banker at Constantinople, engaged in a series of operations on the Bourse with MM. Schiff & Co., English subjects. The operations resulted in 1885 in a balance of £1400, for which Rouet, on May 11, 1885, signed two promissory notes to the order of Schiff & Co. These bills having been protested at maturity, MM. Schiff brought suit against their debtor, who set up in defence that the transaction was void for gaming. To meet this defence, MM. Schiff invoked the law of March 25, 1885. But Rouet replied that this law had no retroactive effect, and that on the day of signing the notes it had not yet gone into effect in Constantinople.

By judgment of June 25, 1886, the Consular Court of Constantinople, in which the suit was brought, decided in favor of Schiff & Co. as follows:—

“As to the obligatory force at Constantinople of the law of March 28–April 8, 1885; our legislation has not made special provisions for the promulgation of law in the Levant, and the presumption of Article 1 of the Civil Code<sup>1</sup> ceases at the frontiers of the fatherland, and cannot be extended to Frenchmen residing abroad. The consular tribunals ought, by analogy with our laws in force, while protecting private interests, to conform to established rules in asserting the authority of laws. There are two systems possible, that of Article 73 of the Code of Procedure, which grants a delay of two months as legally necessary for knowledge of a legal process to be presumed to have reached the interested party, and that of the Decree of 5–11 November, 1870. Article 73, Co. Proc., had quite another object than that of a legislator in determining when a new law shall become obligatory; it granted a long delay in order to permit a Frenchman in a foreign land to prepare a method of defence and to provide at leisure for the formalities of a lawsuit; but the same considerations do not exist in a matter of promulgating law, where the object is to give notice of the legislative will. The consular tribunals ought, therefore, to follow the rule laid down in the decree of 5–11 November, 1870.

“By virtue of this decree, the promulgation of laws results from

<sup>1</sup> “Laws . . . shall be executed in every part of the Republic from the moment when their promulgation can be known there.”

their insertion in the *Journal officiel*. Laws are obligatory in Paris a full day after the promulgation; and everywhere else a full day after the *Journal officiel* containing them arrives at the capital city of the county. The law as to sales for future delivery was promulgated in the *Journal officiel* on April 8, 1885, and the *Journal officiel* reached Constantinople on the 18th of the same month; the new law therefore came in force there the 18th of April. The notes in question were signed the following 11th of May; consequently the new law was at that date promulgated and binding on all. This law grants an action to the creditor on a gaming debt, and therefore the defence set up by Rouet should be rejected.

“For these reasons:—overrules Rouet’s plea; adjudges him to pay Schiff & Co. the sum of £1400, due on two notes of £700 each, with legal interest, etc.”

M. Rouet appealed, but on April 21, 1887, the Court of Appeal of Aix affirmed the decision of the lower court.

Error was brought by M. Rouet for violation of Art. 1 of the Civil Code and for misapplication of the decree of Nov. 5, 1870, and of the principles governing the promulgation and publication of laws; in that the judgment had declared applicable *ipso jure* to Frenchmen residing abroad a law which had not been published there, on the erroneous ground that the provisions of said decree were not relative solely to the publication of laws in France.

### *Judgment.*

THE COURT. As to the only error alleged:

Article 1 of the Civil Code and Article 1 of the decree of Nov. 5, 1870, apply exclusively to the execution and to the publication of laws in French territory; they cannot be applied to govern the case where the question to be determined is, when a law promulgated and published in France should be presumed to be known by French citizens residing abroad. In the silence of the law in this respect, it is the duty of the courts to determine this question according to the circumstances of the case, especially by taking account of the day of arrival of the *Journal officiel* in the place where the act in question took place. In the exercise of this duty, the Court of Aix has found that the *Journal officiel* containing the law of March 28, 1885, promulgated the following 8th of April, reached Constantinople April 18, 1885, and that the notes in question were signed May 11 following. From these facts the judgment attacked, whatever other grounds it was rested upon, might properly have been rested on this conclusion, that the law of March 28, 1885, was known to the maker of the notes when he signed them, and was therefore obligatory on him.

*Application dismissed.*



## SWIFT v. TYSON.

SUPREME COURT OF THE UNITED STATES. 1842.

[Reported 16 Peters' Reports, 1.]

MR. JUSTICE STORY delivered the opinion of the court.<sup>1</sup>

This cause comes before us from the Circuit Court of the Southern District of New York, upon a certificate of division of the judges of that court.

The action was brought by the plaintiff, Swift, as endorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the first day of May, 1836, for the sum of one thousand five hundred and forty dollars, thirty cents, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton endorsed to the plaintiff. The bill was dishonored at maturity. . . .

In the present case, the plaintiff is a *bona fide* holder (without notice) for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles as by the express provisions of the thirty-fourth section of the Judiciary Act of 1789, ch. 20. And then it is further contended, that by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments. . . .

To say the least of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain that the Court of Errors have not pronounced any positive opinion upon it.

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the thirty-fourth section of the Judiciary Act of 1789, ch. 20, furnishes a rule

<sup>1</sup> Part of the opinion is omitted. — Ed.

obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold, that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is. to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intent and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the

commercial world. Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtenebit.

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. . . .

We are all, therefore, of opinion, that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.

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**MURRAY v. CHICAGO & NORTHWESTERN RAILWAY CO.**

CIRCUIT COURT OF THE UNITED STATES, N. DIST. IOWA. 1894.

[*Reported 62 Federal Reporter, 24.*]

SHIRAS, J. In the amended petition filed in this cause it is averred that during the years 1875 to 1887, inclusive, the plaintiff was engaged at Belle Plaine, Iowa, in the business of buying and shipping to Chicago grain, cattle, and hogs, the same being shipped in car-load lots over the line of railway owned and operated by the defendant company; that, at the several times when the shipments were made, the defendant company had posted at its stations, including that at Belle Plaine, printed lists containing the tariff rates charged by the company for the transportation of freight over its line; that, when plaintiff shipped his stock, he applied to the defendant and its station agent at Belle Plaine for the lowest freight rates charged, and was answered by the defendant and its station agent that the posted rates were the lowest and only rates charged by the company, no rebates or concessions in any form being made therefrom to any one; that thereupon the plaintiff shipped his stock, and paid the posted rates therefor; that in fact such representations were false, and were made to mislead the plaintiff; that in fact, as the defendant and its agents well knew, rebates and concessions were then being made to other parties who were competitors in business of the plaintiff, to the great injury of plaintiff; that the fact that these rebates were allowed to the competitors of plaintiff was kept concealed by the defendant, and was not discovered by the plaintiff until within eighteen months previous to the commencement of this action: that upon shipments of grain made from points west of Belle Plaine to Chicago the defendant charged the shippers thereof some \$15 per car less than it was then charging the

plaintiff for shipping the same kind of grain from Belle Plaine to Chicago, thus discriminating against the plaintiff, and compelling him to pay an excessive and unreasonable rate. To recover the damages claimed to have been thus caused him, the plaintiff brought this action in the Superior Court of the city of Cedar Rapids, Iowa, whence it was removed to this court upon the application of the defendant company. On part of the defendant, a motion for a more specific statement has been filed, followed by a demurrer, and both have been submitted to the court.

The principal point made in the demurrer is that the petition on its face shows that the shipments made from Belle Plaine, Iowa, to Chicago, Ill., were in the nature of interstate commerce, the regulation of which is reserved to Congress, exclusively, by sect. 8, art. 1, of the Constitution of the United States, and that, at the dates of the several shipments in the petition described, there was no act of Congress or other law regulating commerce between the several States. If I understand correctly the position of the defendant company, it is that, as this action was commenced in the State court, this court, upon removal, succeeds only to the jurisdiction which the State court might have exercised rightfully in case no removal had been had; that in the State court the action could not be maintained for two reasons: First, that as sect. 8, art. 1, of the Constitution of the United States confers the right to regulate interstate commerce exclusively upon Congress, thereby depriving the States of the power to legislate touching the same, it follows that State courts are deprived of all jurisdiction over cases growing out of interstate commerce; and, second, that there is no common law of the United States; that the common law of England has become the common law of the several States, in such sense that each State has its own common law; and that the common law of the State of Iowa cannot be applied to interstate commerce, in view of the provisions, already cited, of the Constitution of the United States. Dealing with these propositions in the reverse order of their statement, is it true that the principles of the common law are not in force in the United States with respect to such subjects as are placed within the exclusive control of Congress? It will not be questioned that, before the Revolution, the common law was in force, so far as applicable, in the several colonies then existing. Thus, in *U. S. v. Reid*, 12 How. 361, 363, it is said: "The colonists who established the English colonies in this country undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, so far as they were applicable to the situation and local circumstances of the colony."

When the Constitution of the United States was adopted, it was based upon the general principles of the common law, and its correct interpretation requires that the several provisions thereof shall be read in the light of these general principles. The final disruption of all political ties between the colonies and the mother country did not terminate

the existence of the common law in the colonies. It came originally into the several colonies, not by force of legislative enactments to that effect by the Parliament of Great Britain, and the effect of which might be held to have terminated when the colonies became independent, but, as is said by Mr. Justice Story, speaking for the Supreme Court in *Van Ness v. Pacard*, 2 Pet. 137, 144: "Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

In *Cooley*, Const. Lim. 31, it is said: "From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law, as then existing in England, was not suited to their condition and circumstances in the new country, and those particulars they omitted as it was put in practice by them. They also claimed the benefit of such statutes as, from time to time, had been enacted in modification of this body of rules; and, when the difficulties with the home government sprung up, it was a source of immense moral power to the colonists that they were able to show that the rights they claimed were conferred by the common law, and that the King and Parliament were seeking to deprive them of the common birthright of Englishmen. . . . While colonization continued, — that is to say, until the war of the Revolution actually commenced, — these decisions were authority in the colonies, and the changes made in the common law up to the same period were operative in America also, if suited to the condition of things here. The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people, as well as through statutory enactments. The colonies also had legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When, therefore, they emerged from the colonial condition into that of independence, the laws which governed them consisted — First, of the common law of England, so far as they had tacitly adopted it, as suited to their condition; second, of the statutes of England or of Great Britain, amendatory of the common law, which they had in like manner adopted; and, third, of the colonial statutes. The first and second constituted the American common law, and by this, in great part, are rights adjudged and wrongs redressed in the American States to this day."

Thus it appears that, when the Constitution of the United States was adopted, the general rules of the common law, in so far as they were applicable to the conditions then existing in the colonies, and subject to the modifications necessary to adapt them to the uses and needs of the people, were recognized and were in force in the colonies, and the

people thereof were entitled to demand the enforcement thereof through the judicial tribunals then existing. The adoption of the Constitution did not deprive the people of the several colonies of the protection and advantages of the common law. The Constitution itself recognizes the fact of the continued existence of the common law, and indeed it is based upon the principles thereof, and its correct interpretation requires that its provisions shall be read and construed in the light thereof. By sect. 2, art. 3, of the Constitution it is declared that: "The judicial power shall extend to all cases in law and equity, arising under this Constitution; the laws of the United States, and treaties made or which shall be made, under their authority; . . . to all cases of admiralty and maritime jurisdiction. . . ."

In this section we have a clear recognition of the existence of the several systems of law, equity, and admiralty. The section does not create these systems, but, recognizing their existence, it declares the extent of federal jurisdiction in regard thereto. The rules and principles which form the laws maritime are not created by the Constitution, for, as is said by Chief Justice Marshall, in *Insurance Co. v. Canter*, 1 Pet. 511, 546: "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself, and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."

In *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 390, it is declared that: "By the Constitution, the entire admiralty power of the country is lodged in the federal judiciary, and Congress intended, by the ninth section, to invest the district courts with this power, as courts of original jurisdiction."

The Constitution does not create a system of maritime law, nor does it enact that the system, as prevailing in England or in Europe, shall become the law of the United States; but, recognizing the fact that the law maritime was then in force in the colonies, it confers the jurisdiction upon the federal courts. The same is true of the equitable jurisdiction. It is certainly not necessary to cite authorities in support of the proposition that the Constitution of the United States neither created nor enacted a system of equitable jurisprudence and procedure, but, recognizing the existence of the system, it conferred upon the courts of the United States jurisdiction in equity, maintaining the pre-existing distinction between equitable and legal remedies. Is it not clear that the same is true in regard to the common law? At the time of the adoption of the Constitution there was in existence in the colonies the system of the common law, of equity, and of admiralty. It was not the purpose of the Constitution to abrogate any one of these systems. One of the main objects sought to be accomplished was to establish the extent of the legislative and judicial powers of the national government then being created. Owing to the fact that it was not proposed to destroy the State governments then existing, but, continuing these, to create a national government, to be paramount and

supreme within its limited sphere, it became a necessity that the extent of the powers of each government should be defined; and, in a general sense, it may be said that the plan adopted was to confer upon the national government the power of control over subjects affecting the country or people at large, reserving to the States control over all that are local, or which do not require a uniform system or law for their proper regulation. Can it be denied that, at the time of the adoption of the Constitution, the people of the several States possessed the rights, and were subject to the duties and obligations, recognized and enforced by the principles and modes of procedure forming the separate systems of law, equity, and admiralty? Is there any ground for holding that it was the purpose of the Constitution to recognize the continuing existence of the systems of equity and admiralty, but to deny the existence of the common law, or to refuse its recognition? Such a construction of its provisions is clearly inadmissible. The principles and modes of procedure of the three systems of law, equity, and admiralty, in force previous to the adoption of the Constitution, remained in force after its adoption, save as to such modifications as were created by the provisions of the Constitution. That this is the true view of the question appears, not only from the references found in the Constitution, and the amendments thereto, to the common law, as a recognized and existing system, but in the judiciary act of 1789 the several branches of the law, such as the law of nations, the common law, the admiralty and maritime law, and equity are fully recognized as then existing, and the jurisdiction arising under the same is divided between the courts created by that act. That the principles of the common law have always been recognized and enforced in proper cases by the courts of the United States is a proposition so plain that a citation of the cases is not necessary for its support; yet, to show the course of judicial action in this particular, a few of the numerous cases to be found in the decisions of the Supreme Court will be quoted from.

In *Cox v. U. S.*, 6 Pet. 172, 204, wherein suit was brought in the United States court in Louisiana upon the bond of a navy agent, it was held that the bond must be deemed to be a contract performable at the city of Washington, "and the liability of the parties must be governed by the rules of the common law." To the same effect is the ruling in *Duncan v. U. S.*, 7 Pet. 435. In *Swift v. Tyson*, 16 Pet. 1, 18, — a case involving the law of negotiable paper, — the Supreme Court held that the provisions of the thirty-fourth section of the Judiciary Act of 1789 did not require the courts of the United States to follow the ruling of the State courts upon the principles established in the general commercial law, it being said by Mr. Justice Story, speaking for the court, that: "We have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought,

not in the decisions of the local tribunals, but in the general principle and doctrines of commercial jurisprudence."

To the same effect is the ruling in *Oates v. Bank*, 100 U. S. 239, and *Railroad Co. v. National Bank*, 102 U. S. 14. In the latter case it is said: "The decisions of the New York court, which we are asked to follow in determining the right of parties under a contract there made, are not in exposition of any law local to that State, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one State, or dependent upon local authority, but one arising out of the usages of the commercial world."

In *Fenn v. Holmes*, 21 How. 481, 484, it is said: "In every instance in which this court has expounded the phrases 'proceedings at common law' and 'proceedings in equity,' with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to the rights and obligations essentially legal, and the latter as meaning the administration with reference to equitable, as contradistinguished from legal, rights of the equity law, as defined and enforced by the Court of Chancery in England."

In *Railroad Co. v. Lockwood*, 17 Wall. 357, the question of the power of a common carrier to exempt himself by contract from the liability placed upon him by the common law is discussed at length, and it was held that the court was bound to decide the question upon the ground of public policy, and according to the principles of general commercial law.

The case of *Kohl v. U. S.*, 91 U. S. 367, 374-376, presented the question whether the United States could exercise the right of eminent domain for the purpose of condemning land in the city of Cincinnati, to be used as a site for a public post-office. The right was maintained, it being said that: "When the power to establish post-offices and to create courts within the States was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means, well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. . . . The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. . . . It is difficult, then, to see why a proceeding to take land by virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right."



In *Moore v. U. S.*, 91 U. S. 270, the question was, by what law is the Court of Claims to be governed in respect to the admission of evidence in the hearings had before it? and the Supreme Court held that: "In our opinion it must be governed by law; and we know of no system of law by which it should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law. The great majority of contracts and transactions which come before the Court of Claims for adjudication are permeated, and are to be adjudged, by the principles of the common law."

In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 681, it is said: "The Atchison, Topeka & Santa Fé Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations, and to regulate the time and manner in which it will carry persons and property, and the price to be paid therefor. As to all these matters it is undoubtedly subject to the power of legislative regulation, but, in the absence of regulation, it owes only such duties to the public, or to individuals, associations, or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition."

In *Railroad Co. v. Baugh*, 149 U. S. 368, was presented the question whether the engineer and fireman of a locomotive engine are fellow servants, so that the fireman could not recover from the railway company damages for injuries caused by the negligence of the engineer, there being no statutory enactment to that effect in the State of Ohio, wherein the accident happened. Under the decisions of the Supreme Court of Ohio, liability on part of the railway company existed; but the Supreme Court of the United States refused to follow these rulings, holding that: "The question is essentially one of general law. It does not depend upon any statute. It does not spring from local usage or custom. There is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the States to legislate and change the rules of the common law in this respect, as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of that law."

Citations of this character from the decisions of the Supreme Court might be continued almost without limit. From them it appears, beyond question, that the Constitution, the Judiciary Act of 1789, and all subsequent statutes upon the same subject, are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law. When the Constitution was adopted, it was not the design of the framers thereof to create any new systems of general law,

nor to supplant those already in existence. At that time there were in existence and in force in the colonies or States, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the Constitution was erected. The problem sought to be solved was not whether the Constitution should create or enact a law of nations, of admiralty, of equity, or the like, but rather how should the executive, legislative, and judicial powers and duties based upon these systems, and necessary for the proper development and enforcement thereof, be apportioned between the national and State governments. The principles, duties, and obligations inhering in these systems of law were already in force. The Constitution neither created nor adopted them, but, recognizing the fact that they were in fact in existence, and were the possessions of the people, it proceeded to apportion the exercise thereof between the national and State governments. The general line of division, as already said, is based upon the principle of national control over subjects affecting the country and the people as a whole, and wherein uniformity of rule and control is desirable, if not indispensable, and of State control over subjects of local interests. The result was that upon the national government was conferred, as to some subjects, paramount and exclusive control; as to others, paramount, but not exclusive, control, unless Congress by legislation excluded State action; as to others, control concurrent with the States. The division thus made is as to the subjects of legislative and judicial jurisdiction, and not a division of systems of law. The Constitution does not place under national control the law of nations and of admiralty, and under State control common law and equity, but it divides the subjects of governmental control, and each subject carries with it the law or system appropriate thereto. The subject-matter of dealing with other nations is conferred exclusively upon the national government, and of necessity all questions arising under the law of nations and the right to seek changes in this law by conventions with other governments are committed to the national government. The right to regulate foreign commerce is conferred exclusively upon Congress, and of necessity that confers upon the national legislature and judiciary the duty of enforcing the law maritime. The right to regulate interstate commerce is conferred exclusively upon Congress, and, when it legislates, the resulting statute will be interpreted with reference to the general principles of the common law. In the absence of Congressional regulation of interstate commerce, the courts called upon to decide cases arising out of interstate commerce must apply the principles of the common law. So, also, when called upon to decide cases arising out of intrastate commerce, when there is no state statute or law applicable thereto, the courts must apply the common law. The apportionment of control over foreign, inter and intra state commerce, made by the Constitution, did not affect the applicability of the common law thereto. It divided the control over the general sub

ject of commerce, and apportioned to the national government exclusive legislative control over foreign and interstate commerce; and this apportionment carried with it the right to confer upon the national judiciary jurisdiction over cases involving foreign and interstate commerce, and, in the exercise of this jurisdiction, the courts are bound by the general principles of the common law, save where the same have been changed by legislative enactment.

To me it seems clear, beyond question, that neither in the Constitution, nor in the statutes enacted by Congress, nor in the judgments of the Supreme Court of the United States, can there be found any substantial support for the proposition that, since the adoption of the Constitution, the principles of the common law have been wholly abrogated touching such matters as are by that instrument placed within the exclusive control of the national government. But it is not to be denied that support to the proposition is to be found in part of the reasoning employed by Mr. Justice Matthews in announcing the opinion of the Supreme Court in *Smith v. Alabama*, 124 U. S. 465. This case came before the Supreme Court upon a writ of error bringing into review a judgment of the Supreme Court of Alabama affirming a judgment of the city court of Mobile in habeas corpus proceedings, and which presented the question whether a statute of the State of Alabama, providing for the examination and licensing engineers engaged in operating locomotive engines in that State, was void, as applied to engineers running interstate trains, on the ground that it was an attempt to regulate interstate commerce. The case did not in fact involve any question in regard to the common law. The judgment of the court was that the statute was passed to secure the safety of the public in person and property, and any effect it had upon interstate commerce was incidental and remote; and the validity of the statute was sustained. In the course of the opinion it is pointed out that the laws of the States provide for remedies in cases of nonfeasance or misfeasance on part of common carriers, and that it had never been held that such laws were void, as being unconstitutional regulations by the State of interstate commerce. Following these propositions, we find it said: "But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or, if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties, which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Con-

gress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which, until displaced, covers the subject. There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England, as adopted by the several States, each for itself, applied as its local law, and subject to such alterations as may be provided by its own statutes. . . . There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction, which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject and constitutes a common law, resting on national authority."

The meaning to be given to this last sentence quoted from the opinion of Mr. Justice Matthews is not at all clear. If it be true that the Supreme Court, in construing the provisions of the Constitution, and the laws and treaties made in pursuance thereof, has the right to adopt, as the basis of its constitution, so much of the common law as may be implied in the subject, which proposition seems to be affirmed, then is it not true that the principles of the common law, so far as applicable to the subject-matter, are recognized as in force touching matters of national control? It is evident that it was present to the mind of the learned justice whose opinion we are considering that it would not do to hold that the failure of Congress to legislate touching the duties and obligations of common carriers engaged in interstate commerce left the public without any law for its protection, and therefore the suggestion is made that: "The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law."

The rules prevailing in the different States may be variant or antagonistic. A delivery of goods may be made to a common carrier in California, for transportation to New York. Do the legal relations, duties, and obligations existing between the shippers and carrier vary and change as the shipment passes State boundaries, so as to accord with the local law of each State through which the carrier may choose to take them? Upon such a theory, what becomes of the principle that the exclusive control of foreign and interstate commerce was committed to Congress in order to secure a uniform rule touching the same? I would amend the statement of Mr. Justice Matthews so that it should read: "The failure of Congress to legislate can be construed only as an intention not to disturb what already exists; and as, at the time of the adoption of the Constitution, common carriers, under the

principles of the common law, were subject to certain duties and obligations, the failure on the part of Congress to legislate thereon evinces the legislative intent to leave the rules and principles of the common law in full force, as controlling and defining the relations, duties, and obligations of common carriers engaged in interstate commerce."

It will be further noticed that it is suggested in the opinion that it might be implied that Congress has supplied a law or rule governing foreign and interstate commerce. Is there not as good ground to be found in the provisions of the Constitution, and the statutes based thereon, for implying the recognition of the principles of the common law, as there is for implying the recognition of the law of nations, or the maritime law as applied to foreign commerce? Suppose a merchant or manufacturer residing in the United States makes a shipment of goods by land into the dominion of Canada, and another shipment of goods to England by sea, in both instances the goods being delivered to common carriers for transportation and delivery; would not the duty and obligations resting upon the steamship line to which the goods destined for England were delivered be measured by the law maritime? What express provision of the Constitution or of the statutes of the United States declares that shipowners engaged in foreign commerce are subject to the law maritime? Has Congress ever adopted a code of laws declaring what the rules and principles are that are applicable to foreign commerce carried on over the high seas or the navigable waters of the country? It has adopted specific provisions modifying the general principles of the law, but it has always recognized the existence of the general system. Can it be contended that, in the absence of legislation by Congress expressly adopting the law maritime, foreign shipments upon the ocean are without legal protection; that, from the acceptance of the goods for transportation and delivery, no implied contract is created; that the respective rights and duties of the parties are such, and such only, as may be created by express contract between the parties? Even if an express contract is entered into, by what rules and principles are its provisions to be construed? That the law maritime has been in force, and is now in force, in the United States, cannot be questioned; and yet it was not created or expressly enacted in the Constitution or any act of Congress. That system of law was in existence when the Constitution was adopted, and its existence is recognized in the Constitution, and provision is made for enforcing the same by conferring admiralty jurisdiction upon the courts of the United States. From this the inference, and the only inference, is that it was not the intent of the Constitution to abrogate the then existing maritime law, but, recognizing its existence, to provide for its enforcement in all matters to which it is applicable, including foreign commerce. There is no doubt, therefore, that, as to that part of foreign commerce which is carried on through the agency of common carriers upon navigable waters, there is a system of law applicable thereto, and courts having jurisdiction to enforce the prin-

ciples of the system. How is it, in regard to that part of foreign commerce carried on with neighboring countries, where the transportation is by land, as in the case supposed of a shipment of goods to Canada? It is said that the common carrier engaged in foreign commerce cannot be held subject to the principles of the common law, because Congress has not expressly adopted the common law, and therefore it cannot be applied to shipments made to foreign countries. Is not the existence of the common law as fully recognized in the Constitution, and the laws of Congress based thereon, as is the existence of the law maritime? Do not the Constitution and the judiciary act confer upon the courts of the United States full common-law jurisdiction? Are not the courts of the United States, therefore, authorized to enforce the principles of the law maritime and the common law in all cases to which they are applicable, and which are within the jurisdiction of the federal courts? Suppose a shipment of goods is made from San Francisco, through New York, to England. The carrier receives the goods to be sent by land to New York, and thence by ship to England. No special contract is made. This shipment is a matter of foreign commerce. When placed on shipboard at New York for transportation to England, is there any doubt that the law maritime is applicable thereto, and that, if litigation should arise regarding the ocean transportation, the courts of the United States would apply the principles of the law maritime thereto? If litigation with the common carrier should arise touching the land transportation, would not the courts of the United States have the right to apply the principles of the common law thereto? Upon what fair principle of construction can it be held that the Constitution so far recognizes the law maritime that it must be held to be in force, but that the recognition of the common law is not sufficient to keep it in force in matters of national concern?

In *Swift v. Railroad Co.*, 58 Fed. 858. — a case decided by the United States Circuit Court for the Northern District of Illinois, — it is held that the law of the State of Illinois could not be applied to contracts for shipments of property into other States; that interstate commerce cannot be controlled by the local law of the State, either statutory or common; that, previous to the enactment of the Interstate Commerce Act by Congress, there was no act of Congress regulating interstate commerce; that the United States had never adopted the common law; that, previous to the adoption of the Interstate Commerce Act in 1887, there was therefore no law controlling the relations of carriers and shippers in regard to interstate commerce. If it be true that the principles of the common law are not in force in this country in regard to such matters as are placed under national control, then it is difficult to escape the conclusions reached by Judge Grosscup in the case just cited; but I cannot concur in the proposition that the principles of the common law have no existence in this country as applicable to national affairs, or that these principles have only a local existence, due to their adoption by the several States. It is

certainly a novel proposition that up to the date of the enactment of the Interstate Commerce Act, in 1887, all the foreign and interstate commerce of the country was without the pale of law, and that there were no legal rules or principles which governed or controlled the relations between the shippers or carriers engaged in that business; and yet such seems to be the conclusion in *Swift v. Railroad Co.* In *Railway Co. v. Osborne*, 3 C. C. A. 347, 52 Fed. 912, — a case involving the construction of the Interstate Commerce Act, — Mr. Justice Brewer, speaking for the court, held: "It was the first effort of the general government to regulate the great transportation business of the country. That business, though of a quasi public nature, and therefore subject to a governmental regulation, has, as a matter of fact, been carried on by private capital through corporations. The fact that it was a public business always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit for its use. A reasonable compensation was all they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it."

Mr. Justice Brewer is here speaking of the condition of affairs before the enactment of the Interstate Commerce Act, and he expressly declares that, prior to that act, common carriers engaged in interstate commerce were bound to charge only a reasonable compensation, or, in other words, they were subject to the principles of the common law.

It is further argued that it has been repeatedly decided that the inaction of Congress, up to 1887, in passing any law regarding interstate commerce, shows that the intent was to leave such commerce free from all restraint, and therefore common carriers assumed no common-law liability in undertaking shipments of goods from one State to another. The decisions of the Supreme Court in the numerous cases involving the validity of State laws affecting foreign and interstate commerce have always held that the inaction of Congress could not be construed to mean that the States were at liberty to legislate in regard to these subjects in the absence of congressional legislation, but that such inaction evidenced that it was the intent of Congress to leave commerce, foreign and interstate, free from all legislative restrictions. It has never been held, however, that the freedom of commerce meant that those engaged in carrying it on were not under legal restraints and obligations growing out of the relations of carriers and shippers. If the theory now contended for by the defendant company be correct, then from the foundation of the government up to April 4, 1887, when the Interstate Commerce Act took effect, it was open to all the common carriers engaged in foreign or interstate commerce to act as they pleased in regard to accepting or refusing freights, in regard to the prices they might charge, in regard to the care they should exercise, and the speed with which they should transport and deliver the property placed in their charge. What more disastrous restraint upon the true freedom of foreign and interstate commerce could be devised than the adoption

of the doctrine that the inaction of Congress left the carriers engaged therein entirely free to accept and transport the property of one man or corporation, and to refuse to accept the like property of another, or to transport the products of one locality, and to refuse to transport those of another; to charge an onerous toll upon the property of one, and carry that of his neighbor for nothing? Can it be possible that the transcontinental railways and other federal corporations engaged in foreign and interstate commerce, in the absence of congressional legislation, were not under any legal restraints, and that the citizen, in his dealings with them, was without legal remedy or protection? In the absence of congressional legislation, what law could be applied to them, with regard to matters under the exclusive control of the national government, except the principles of the common law or the law maritime? I cannot yield assent to the broad proposition that, as to those subjects over which Congress is given exclusive legislative control, there is no law in existence if Congress has not expressly legislated in regard thereto. The true doctrine, in my judgment, is that the Constitution of the United States, when it was adopted, gave full recognition to the existing systems of the law of nations, of admiralty and maritime, of the common law, and equity. It apportioned to the national government, then created, control over certain subjects, exclusive as to some, concurrent as to others. This apportionment of control over certain subjects necessitated the exercise of both legislative and judicial powers, and provision was made for the former in the creation of Congress, and for the latter in the creation of the Supreme Court, and by conferring authority on Congress to create other courts. The courts thus created were vested with jurisdiction in admiralty and at common law and in equity. If there is no common-law jurisdiction to be exercised, and no common-law principles to be enforced, why create courts for that purpose? But it is said in *Swift v. Railroad Co.*, and the same thought is found in other cases, that "the courts of the United States have had many occasions to enforce the common law, but in every instance it has been as the municipal law of the State by which the subject-matter was affected." This may be generally, but it is not universally, true. In *Mississippi Mills v. Cohn*, 150 U. S. 202, we find a case which was originally brought in a court of the State of Louisiana, in which State the civil, and not the common, law is in force. The suit was removed into the United States Circuit Court, and was by that court dismissed for want of jurisdiction, upon the ground that, being a suit in equity, it could not be maintained, because the remedy at law was sufficient. The Supreme Court reversed the ruling, holding that even if, under the law of the State of Louisiana, — that is, the civil law, — the remedy at law was sufficient, yet that fact would not defeat the jurisdiction in equity of the federal court, for the reason "that the inquiry, rather, is whether, by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States,



the relief here sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give." In this ruling the Supreme Court was certainly not enforcing the municipal law of the State of Louisiana. If courts of the United States can only recognize and enforce the principles of the common law when the same form part of the municipal law of the State, how comes it that the Supreme Court directed the Circuit Court in Louisiana to apply the principles of the common law and of equity, as they existed when the Constitution was adopted, to the decision of the question of jurisdiction arising in that case? Suppose a State should enact that all questions of title to realty should be triable only in a Court of Equity, and in accordance with the principles of equity; would that enactment confer upon the courts of the United States the same jurisdiction, and thus permit a question of strict legal title to be tried in equity in the courts of the United States, if, according to the principles of the common law in force when the Constitution was adopted, an action in ejectment would afford an ample remedy? Clearly, the federal court could in such case entertain only the common-law action, and in so doing it would be acting under and enforcing the principles of the common law, not the municipal law of the State, for it would be disregarding that, but the common law brought by our ancestors from the mother country.

Perhaps the most forcible illustration of the fact that the government of the United States does recognize and enforce the principles of the common law with regard to subjects wholly within national control, and not as part of the municipal law of any State, is found in connection with the organization and proceedings of the Court of Claims. This court is not a court in and for the District of Columbia, nor is it a court of any district or circuit. It has jurisdiction over cases arising in any of the States or Territories. It has jurisdiction to hear and determine cases against the United States. Of all the courts in the Union, it is the one dealing with matters of national concern, arising under the Constitution and laws of the United States, and not under the local law of the several States. The form of procedure is statutory, supplemented by rules of its own adoption. As to this court thus organized, and clothed with a jurisdiction wholly national in its character, the express ruling of the Supreme Court is to the effect that the general law controlling its action is the common law. To repeat a quotation already made from the opinion of the Supreme Court in *Moore v. U. S.*, 91 U. S. 270, in regard to the Court of Claims: "In our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law. . . . The great majority of contracts and transactions which come before the Court of Claims for adjudication are permeated and are to be adjudged by the principles of the common law."

To the same effect is the ruling in *U. S. v. Clark*, 96 U. S. 37, and there are no decisions to the contrary. There is no act of Congress which adopts the common law as the rule of action for the Court of

Claims. The reasons which declare the common law to be the system governing its action apply equally to the other courts of the United States. By the provisions of the Act of Congress of March 3, 1887, concurrent jurisdiction with the Court of Claims is conferred upon the District and Circuit Courts of the United States. Many of the claims against the United States arise out of implied contracts; that is, the facts are such that, according to the principles of the common law, an obligation to pay for the use of property is implied, in the absence of an express contract. Thus, in *U. S. v. Palmer*, 128 U. S. 262, the judgment of the Court of Claims awarding to Palmer the sum of \$2,256.75 as a reasonable compensation for the use, by the government, of certain patented military equipments, was sustained by the Supreme Court, it being said that "we think an implied contract for compensation fairly arose under the license to use, and the actual use, little or much, that ensued thereon." In this case there was no express agreement for compensation nor for the amount thereof. Applying the principles of the common law to the facts, the Court of Claims held that the law would imply a contract to pay a reasonable compensation, and the Supreme Court affirmed the judgment. Had Palmer brought the suit in a Circuit Court of the United States instead of in the Court of Claims, is it possible he would have been defeated on the ground that the local law of the State did not apply, and that the common law could not be invoked in a Circuit Court of the United States, and therefore there was no law applicable to the situation in the absence of an express contract? The right of recovery in such cases is not dependent upon the court in which the action may be brought, but upon the question of the principles of law — that is, the system of law — which are applicable to the situation, and which define the rights and obligations of the parties. Under the principles of the common law, as the same existed at the time of the separation between the colonies and Great Britain, common carriers of goods assumed certain duties and obligations to their patrons. The adoption of the Constitution of the United States certainly did not change the relation existing between the carrier and the public, nor in any way affect the obligations assumed by the carrier. The Constitution conferred legislative control over foreign and interstate commerce upon Congress, reserving to the several States legislative control over intrastate commerce. This division of legislative control did not, however, abrogate the common-law principle then in force. Thus, in *Boycie v. Anderson*, 2 Pet. 150, the question presented was whether the strict rule of the common law in regard to liability for goods lost could be applied in the case of slaves; and it was held that it would not be applied, as slaves were human beings having a volition of their own; but it was held that "the ancient rule that the carrier is liable only for ordinary neglect still applies to them." In determining the rights of the parties in this case, the Supreme Court, speaking by Marshall, C. J., relied upon the common law for its guidance. In *Bank of Kentucky v. Adams Exp.*

Co., 93 U. S. 174, the question arose as to the liability of the express company for certain packages of money sent from New Orleans, La., to Louisville, Ky., and which were destroyed by fire while in transit, the bills of lading containing stipulations in respect to the liability of the company. It will be noticed that the shipment was from one State to another, and therefore was of the nature of interstate commerce. In the course of the opinion it is said: "We have already remarked that the defendants were common carriers. . . . Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers. The duty of a common carrier is to transport and deliver safely. He is made, by law, an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy, or by what is denominated the 'act of God.' . . . The exception or restriction to the common-law liability introduced into the bills of lading given by the defendants. . . ."

Thus we have the express declaration that a common carrier engaged in interstate commerce is subject to the common-law liability pertaining to his occupation. Many other cases of like import are to be found in the Supreme Court Reports, in which it is assumed that the principles of the common law are applicable to common carriers engaged in foreign or interstate commerce; and I can see no good reason for holding that the duties and obligations imposed upon a common carrier by the common law are not operative when he undertakes the transportation of property from State to State. It is said in argument that the obligations imposed upon common carriers are largely based upon considerations of public policy; that each State determines for itself what its public policy demands; and that the courts of the United States can recognize and enforce only the public policy of the State. There is a public policy of the nation as well as that of the several States. As to all such matters as are reserved to the States, and are therefore without the plane of national control, it may well be that it is for each State to determine what public policy dictates with regard thereto. The rule of the common law is that no one can lawfully do that which is injurious to the public, or which conflicts with the prevailing sentiment or interest of the community. In determining whether a given act or course of conduct is injurious to the public interests, regard must be had to the circumstances. That which the public interests may demand in one locality may not be suited to the interests of another locality. There are many matters of a local nature which it is for each State to regulate and control for itself, either by legislation, or by judicial declarations of the results derivable from the application of common-law principles to the existing surroundings. On the other hand, there are many matters which affect the entire country, which are therefore of national importance, and which must be dealt with accordingly. In deciding legal questions arising out of the latter class of cases, courts are not confined to the inquiry whether the particular

State in which the court may be sitting, has an established public policy touching the subject-matter, but they will apply the recognized principles of general jurisprudence, to wit, the principles of the common law, or of the law of nations, or of the law maritime, as the nature of the particular case may demand. Thus, in *Oscanyan v. Arms Co.*, 103 U. S. 261, the Supreme Court held that a contract entered into between a consul general of the Ottoman government residing at New York, and a company engaged in supplying arms, whereby the former was to be paid a commission upon all contracts secured through his aid was void, even though it might be valid in Turkey, it being said: "But admitting this to be otherwise, and that the Turkish government was willing that its officers should take commissions on contracts obtained for it by their influence, that is no reason why the courts of the United States should enforce them. Contracts permissible by other countries are not enforceable in our country if they contravene our laws, our morality, or our policy."

The variety of cases in which this doctrine is applied may be seen by reference to *Marshall v. Railroad Co.*, 16 How. 314; *Tool Co. v. Norris*, 2 Wall. 45; *Trist v. Child*, 21 Wall. 441; *Meguire v. Corwine*, 101 U. S. 108; *Texas v. White*, 7 Wall. 700; *Hanauer v. Doane*, 12 Wall. 342; *Thomas v. City of Richmond*, id. 349; *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643. In these cases, and others of similar import, the Supreme Court does not base the rulings upon the local law of any State, for in the majority of the cases the question arose in connection with matters outside the plane of State control. Thus, in *Trist v. Child*, *supra*, a bill in equity was filed to enforce an agreement for services rendered in getting through Congress a bill for payment to Trist of a remuneration for his services to the United States in negotiating the treaty of Guadalupe Hidalgo with Mexico. Mr. Justice Swayne, speaking for the court, declared that: "It is a rule of the common law, of universal application, that where a contract, express or implied, is tainted with either of the vices last named as to the consideration on the thing done, no alleged right founded upon it can be enforced in a court of justice."

Applying this rule of the common law to the facts of the case, the agreement sought to be enforced was held void.

The conclusion I reach upon this subject is that at the time of the separation of the colonies from the mother country, and at the time of the adoption of the Constitution, there was in existence a common law, derived from the common law of England, and modified to suit the surroundings of the people; that the adoption of the Constitution and consequent creation of the national government did not abrogate this common law; that the division of governmental powers and duties between the national and State governments provided for in the Constitution did not deprive the people who formed the Constitution of the benefits of the common law; that, as to such matters as were by the Constitution committed to the control of the national government,

there were applicable thereto the law of nations, the maritime law, the principles of equity, and the common law, according to the nature of the particular matter; that, to secure the enforcement of these several systems when applicable, the Constitution and Congress, acting in furtherance of its provisions, have created the Supreme Court of the United States and the other courts inferior thereto, and have conferred upon these courts the right and power to enforce the principles of the law of nations, of the law maritime, of the system of equity, and of the common law in all cases coming within the jurisdiction of the federal courts, applying, in each instance, the system which the nature of the case demands; that, as to all matters of national importance over which paramount legislative control is conferred upon Congress, the courts of the United States (the Supreme Court being the final arbiter) have the right to declare what are the rules deducible from the principles of general jurisprudence which control the given case, and to define the duties and obligations of the parties thereto; that the common law now applicable to matters committed to the control of the national government is based upon the common law of England, as modified by the surroundings of the colonists, and as developed by the growth of our institutions since the adoption of the Constitution, and the changes in the business habits and methods of our people; that the binding force of the principles of this common law, as applied to matters affecting the entire people, and placed under the control of the national government, is not derived from the action of the States, and is no more subject to abrogation or modification by State legislation than are the principles of the law of nations or of the law maritime. The transactions out of which the present controversy arises pertain to interstate commerce. The defendant company, when engaged in transporting the grain and cattle of plaintiff from Iowa to Chicago, Ill., was acting as a common carrier of property, and assumed all the duties and obligations pertaining to that occupation. In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action, and therefore, in the present case, all shipments made before the adoption of the Interstate Commerce Act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act.<sup>1</sup> . . .

<sup>1</sup> The remainder of the opinion, upon another point, is omitted. —Ep.

SWIFT *v.* PHILADELPHIA & READING RAILROAD CO.

CIRCUIT COURT OF THE UNITED STATES, N. DIST. ILLINOIS. 1894.

[*Reported 64 Federal Reporter, 59.*]

GROSSCUP, J. This, with other cases involving the same questions, now comes on, upon motion of the defendant, for leave to withdraw pleas, and file demurrers to the declaration. The disposition of the motion is dependent upon whether the declaration sets out a good cause of action, and is practically, therefore, a demurrer to the declaration. The declaration differs in some respects from its predecessor, but, before entering upon the effect of this difference, I propose to revert to the original questions discussed in my former opinion. *Swift v. Railroad Co.*, 58 Fed. 858. I do this because the conclusions of that opinion have been persistently and ably combated, not only in current legal periodicals, but also by some of the courts of the other circuits.

The conclusions to which I arrived in the former opinion may be summarized as follows: The right to recover from common carriers for unreasonable exactions must be found in some positive law of the land, applicable to the case in hand. Such a prohibition is in fact found in the common law; but it is not applicable to the case in hand, unless there be a common law of the United States, as a distinct sovereignty, because the regulation of the rates upon which the suit is dependent is within the scope of interstate commerce, and an exclusively national affair, in which the need of uniformity is imperative. There is no common law of the United States, as a distinct sovereignty; and there being no pronouncement of Congress upon this subject, either expressly or impliedly, outside of the Interstate Commerce Act, and this action not having been brought under the Interstate Commerce Act, there is no law, either of the United States or the State, applicable to the case in hand, and there can therefore be no recovery.

The only link in the foregoing summary that has met with serious objection is the one which affirms the non-existence of a United States common law. Indeed, it is conceded that unless a prohibition against the exaction of unreasonable rates is to be found in the body of the laws in force in the United States, outside of the scope of State jurisprudence, an action such as this cannot be sustained in the courts, either of the United States or the States, for, confessedly, the right to sustain them in the courts of the States is predicated upon the jurisdiction of State courts, in most instances, to enforce personal rights growing out of United States law. In my former opinion, I assumed that there was no common law of the United States, basing that assumption upon the repeated declarations of the Supreme Court. These declarations, I confess, were not decisive of the particular cases in which they occurred, and have not been accompanied by any discussion of the

considerations upon which they are founded; but throughout the literature of that tribunal they have occurred often enough, without even the suggestion of a probable controversy, to justify their acceptance as the settled pronouncement of the court. I propose now, however, to consider the proposition as if it were wholly original and undecided.

Assuming that the regulation of freight rates upon interstate commerce is exclusively a national affair, is there any law of the United States applicable to the case in hand, except such as may be found to have arisen from the legislation of Congress? Is there any common-law prohibition against unreasonable rates? Is there any United States common law at all? This inquiry can only be answered by taking a rapid glance at the whole sweep of our dual system of government, and its legal settings upon the jurisprudence of the past.

What is law? In the sense under review, it is a rule of civil conduct prescribed by the supreme power in the State. Mere definitions of right and wrong are not necessarily law. They may be so manifestly just that they ought to control civil conduct, but the citizen is under no legal obligation to obey them unless they are the expressed command of the supreme power in the State. A rule of civil conduct, to have the force of law, must emanate from some power that is supreme in the field to which the rule belongs. When we would know what the law is, therefore, we must inquire always from what power it proceeds, and the right of that power to prescribe it.

No one doubts the existence of some law of the land everywhere. No plain or valley, no nook or corner, to which the dominion of man has extended itself, is without some law of the land. Indeed, law is the breath of dominion. Its commands are to be found in the express enactments of the sovereign legislative bodies, in the body of our judicial decrees, and in those ancient systems of law to which these later emanations are only supplementary. The last named were brought to the shores of America by the feet of the early emigrants; by the Englishmen, the common law; and, by the Frenchmen and Spaniards, the civil law. Each of these, — the civil and the common law, — within the respective boundaries into which they have settled, constitutes the fundamental rules of civil conduct; and there is no inch of our soil in which one of them is not in force. But, as we have seen, law is not simply a rule of civil conduct, but a rule prescribed by the supreme power in the State. Now, the supreme power of the State is, with us, divided. The line of division is not territorial, but topical. Each inch of soil is subject to the rule of two powers of State, overlapping each other in some respects, but never conflicting, and divided always according to prearranged constitutional adjustments. In some fields the nation is the sole power to prescribe rules of conduct, in other fields that power is exclusively in the State, and in still other fields it is concurrent. It is plain that in the first of these fields the emanation of a rule of conduct from the State, as, in the second, a like emanation

from the nation, would not have the effect of law. Neither, in the field of the other, is a power in the State. The nation has not the power to prescribe rules of civil conduct within the field exclusively belonging to the State. The State has not the power to prescribe rules within the fields exclusively belonging to the nation. From each of these two fields, the nation and the State, as the case may be, is excluded as a lawgiver. Now, this must apply as well to the system of law to which the sovereign succeeds as to that which it immediately creates; to the common or civil law as well as to that which comes from its own legislative or judicial will. In other words, the State or nation, having no power to give law in the fields exclusively belonging to the other, logically, can have succeeded to no law applicable to such fields. Neither can have a common law or a civil law within fields to which it can extend no law at all.

But the contention is that, the lawgiving power being divided topically between State and nation by the Constitution, each of the participants is both the rightful current lawgiver, and the rightful successor to the common law, in the specific field apportioned to it; from which it would follow that the common law, like its own legislation, is prescribed by the State as a rule of civil conduct within the field of powers belonging to the State, and by the nation within the field of powers belonging to the nation. In other words, that the common law or civil law, as the case may be, prevails everywhere, and on every subject, but the source of the command is national or State according to the line of demarkation between the fields of power of the nation and State. This premise accepted, it would follow that the nation, having power to regulate interstate commerce, has succeeded within that field, as sovereign and lawgiver, to the commands embodied in the common law, and that within that field the common law, attributable to the nation, as sovereign, is in force. The error, if there be any, is in the assumption of the premise. It is true that the State has, by succession or adoption, prescribed the common law to its citizens upon subjects within the field of power of the State. Whether the common law would prevail within the State in the absence of express adoption by statute, it is not now necessary to discuss. It is true, also, that upon subjects wholly beyond that field the State can prescribe no such rules of conduct. But it is not necessarily true that within its field of mere power the nation has succeeded to or adopted any code of laws as rules of civil conduct, except those to be found in its legislation. There is no express adoption of any system of laws by the Constitution or by statute, and the theory of the national government does not necessarily imply that it, as sovereign, succeeds to any system of laws. The inquiry is one of fact, rather than speculation, and is to be solved by the intendments of the Constitution. The inquiry is whether the Constitution contemplated that within its field of power the nation should succeed, as sovereign, to the common law, or whether, within that



field, no law should be prescribed by the nation, except by express or implied enactment.

It is plain to me that, so far as the nation is coterritorial with the States, the latter was intended. The great bulk of governmental regulation was meant to be left to the States. The field of power conferred upon the nation, outside of that essential to its functions and defence as a nation among nations, is principally a field of bare power. Over this field of bare power, unenforced by congressional enactment, the powers of the State overlap. In these fields of bare power there are two sovereigns, — the State until the nation acts, the nation only after it acts. Out of this has grown up the doctrine of concurrent jurisdiction, now too firmly fixed to be debated, much less denied. Thus, notwithstanding the power of Congress to establish uniform laws on the subject of bankruptcy, or to fix the standard of weights and measures, or to regulate interstate commerce, the States have, in the absence of national laws in enforcement of these powers, been permitted to establish their own systems of bankruptcy, their own standards of weights and measures, and their own regulation of the great multitude of incidents to interstate commerce. It is settled constitutional law that over these fields, in the absence of congressional enactment, the laws of the State — both those that grow out of legislation and those that have come over from the common law — are the law of the land. And thus it is that largely within the field of even the express powers of the nation, the laws of the State have the primary place, and are only excluded when Congress so wills by express legislative enactment.

Now, what consequences follow if it be assumed that there is a common law of the nation, — rules of civil conduct prescribed by the nation in all fields of its constitutional power? The legislature of Illinois has adopted the common law, so far as it is applicable and of a general nature, and all acts of the British Parliament made in aid thereof prior to the fourth year of James the First, exclusive of designated acts of Parliament. We may assume, for illustration, that the common law of the United States, if there be such, within the fields of bankruptcy, of standards of weights and measures, and of interstate commerce, is definable in the same terms. There exists, then, a common law of the United States over the subject-matter of bankruptcies, standards of weights and measures, and commerce between the States, for laws relating to all of these subjects had grown up and were well established in England prior to the fourth year of the reign of James the First. Is such transplanted jurisprudence the law of the United States? Have its mandates been prescribed by the nation as rules of civil conduct? If so, how is the field still left open to State legislation? By what authority does the State, in the face of such existing national common law, enact and enforce bankrupt and insolvent laws, change the standard of weights and measures, and prescribe the multitude of regulations

that relate to commerce, interstate as well as intrastate? If there be existing laws upon these subjects, referable to the nation as their authority, would it not follow that all legislation of the State, within these fields, is inoperative? There cannot be separate systems of law over the same subject-matter and the same territory, emanating from separate sources of authority. If the nation already has a system, and such system is within its field of power, the State cannot invade that field to change or modify it. The State could as effectively repeal or alter an act of Congress relating to bankruptcies or commerce between the States as repeal or alter the nation's common law touching these subjects, if there be such; for such common law would, until changed by Congress, be the existing mandate of the nation upon those subjects. The proposition contended for would exclude at once the whole conception of concurrent jurisdiction, and leave the State without any power upon any subject concerning which Congress was, under the Constitution, authorized to legislate. It would break down at one stroke the vast and important legislation of the States, that has universally been recognized and enforced as the law of the land, but that occupies fields within the bare power of congressional legislation. It would require the nation, at once, to enter upon what it has never yet attempted, except as the imperative emergency arose, namely, a complete code of laws upon every possible subject within its constitutional powers, where the provisions of the common law had become antiquated or burdensome. If the nation has already prescribed the common law upon subjects within the field of its power, the States are thereby excluded, and the whole doctrine of concurrent jurisdiction is not only without logical basis, but is practically and inherently impossible.

An argument even stronger than these consequences to a settled judicial interpretation of the Constitution is found in the letter of the Constitution itself. To no one more than to the framers of that instrument was it apparent that two systems of law upon the same subject, from different governmental authorities, could not harmoniously exist. One system or the other must be regarded as supreme. Hence, it was provided (article 6) "that the Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding." Observe what is made the supreme law: The Constitution, the laws which shall be made in pursuance thereof, and all treaties made, or which shall be made. If, under the Constitution, the nation adopted or succeeded to the common law of England, as the law of the land, within the field of national power, why should there have been no mention of such common law as a part of the supreme law of the land? Why should it be exposed, any more than the Constitution, or the acts of Congress thereafter

made, to the attack or modification of the States? Treaties are necessarily made laws of the nation, and, hence, the existing treaties were made inviolate against State intrusion. Why should the then existing laws, introduced into the system as continuing laws, share a different fate? Was it contemplated that the rules of civil conduct prescribed to the citizen by the nation, through the supposed body of the common law, should be rules only so long as the States permitted? If a national common law prevails, it is by virtue of the Constitution. Can any reason be assigned why acts of Congress were made supreme, while this supposed act of the Constitution was left subservient?

The new government, for obvious reasons, was compelled to observe its treaties, but, excepting these, it seems plain to me that the framers of the Constitution contemplated a government whose beginnings were there and then, and whose commands to the citizen must be found in the letter of the Constitution, or the laws thereafter promulgated. The great bulk of authority was left with the States. Each of these had already existing laws that covered the body of ordinary current affairs. The nation was not devised to give law upon these affairs. It was invested with a field of vast power, but only to be entered as the needs of nationality from time to time gave rise. No national common law was necessary. The subjects upon which common law acted were principally left to the States, and there it already existed. It was apparent that, as rapidly as the nation was called upon to enter upon its fields of otherwise bare power, Congress could supply the laws needed.

But, it is urged, the Supreme Court has invariably recognized the existence of general law, according to which its administration of justice has proceeded. Thus, for instance, in an action for damages growing out of negligence, within the boundaries of Ohio, the Supreme Court of the United States held the engineer and fireman of a locomotive, running alone, and without any train attached, to be fellow servants (*Railroad Co. v. Baugh*, 149 U. S. 368), while a long line of decisions of the Supreme Court of the State held they were not. So, too, the Supreme Court of the United States held that the payee or indorsee of a bill, upon its presentment to the drawee, and his refusal to accept, had the right to immediate recourse against the drawer, notwithstanding a statute of the State forbidding suit to be brought in such a case until maturity of the bill. *Watson v. Tarpley*, 18 How. 517. It is insisted that these and other cases show the existence of some general law, separate from and independent of the law of the land prescribed by the States. This does not, in my opinion, follow. Indeed, it could not follow without introducing into the jurisprudence of this country the anomaly of the existence of two laws over the same territory, and upon the same subject-matter, enforceable, respectively, according to the accidents of the residence of the parties between whom the differences arise

Suppose, in the Ohio case, that two firemen had been on the engine with the engineer, and both had been injured through his negligence; one of the firemen living in the State of the defendant, and the other living in another State. To each of the injured the locus is identical; the negligence is identical. Is it possible that the accidental difference of residence brings into play a difference of law affecting their rights so radically? Is the obligation of the railroad upon the soil of Ohio, under circumstances identical, different to the Ohioan from what it is to the Kentuckian? The Supreme Court could not have so held. In the case cited the federal court administered, not the law of the United States, but the law of Ohio. The difference between its holdings and those of the courts of Ohio was not due to a difference of law, but to a different interpretation of the law. In all cases to which the jurisdiction of the federal court is extended, its duty is, not only to ascertain the facts, but to interpret the law applicable thereto, as well. The law is the same law interpreted by the State courts, but the interpretations are not necessarily the same. The decisions of the State court are not necessarily the law, but only mirrors of the law. They may be mistaken interpretations, and therefore incorrect mirrors. The litigant in the federal court is entitled to the law as it is, not simply to the local judicial reflection of the law. What the Supreme Court in effect said in that case was, not that the law applicable to the case before it was different from the law applicable to any like case arising in Ohio, but, that the decisions of the State courts had not accurately evidenced the law, and were therefore not to be followed.

The same observation applies to the Mississippi case. The general commercial law in force in Mississippi, as well as in other States of the Union, gave the payee of a bill immediate recourse upon the drawer, upon the refusal of the drawee to accept. The statute of the State, however, forbade suit to be brought until after the maturity of the bill. The question was whether a litigant seeking recovery through the federal courts, before maturity, was barred by this statute. Undoubtedly, the State had the right to modify the commercial law that should prevail within its boundaries. But the statute in question created no change in substance of the commercial law, but only in the remedy that the parties should enjoy. It was purely remedial, and not substantive, and, so far as it was remedial was not necessarily binding upon the federal court. The federal court sat in Mississippi to enforce the commercial law applicable to the given case, and as such was an independent tribunal, to be governed, as to its remedial rules, by the procedure to be found in the common law, the acts of Congress, and the policy of the State, so far as such was found just and applicable. Whether the prohibition of this remedial statute should be applied to a suitor in the federal tribunal was to be determined by itself, upon considerations of justice, and did not mandatorily follow the enactment of the local statute.

That the federal courts enforce, not a general law of the United States, but the law of the particular States applicable to the controversy, is demonstrated by an illustration arising every day. At common law, neither the heirs nor administrators could recover damages for the death of the decedent, though caused by negligence. There has been no act of Congress changing this rule. In most of the States, however, the common law, in this respect, has been modified by permitting a recovery in such cases to a given amount. The federal courts are every day made the scene of such suits. Are the judgments granted therein in pursuance of any common law of the United States? Manifestly, not; for in the common law, unmodified, there can be found no warrant for such suits. The actions, though in the federal court, are based, as in the State court, upon rules of civil conduct prescribed by the State through its adopted common law, with the modifications thereof prescribed by the State.

I can conceive that it may be said that though, in the illustration given, the federal courts enforce State law, it would not follow that, in actions arising from matters within the field of the nation's powers, the federal court may not find a United States common law to enforce. I am not considering that distinction, but am treating of cases which are urged wholly irrespective of such distinction. Neither the Ohio nor the Mississippi case cited, nor any of those to which my attention has been called in that connection, involved subjects within the field of the nation's power. The Ohio case arises from the law of negligence, — a purely police, and therefore local, regulation, — and the Mississippi case does not disclose any element of interstate commerce or other national power. Indeed if the decisions cited established the existence of a United States common law or general law over the subject-matters involved, it would follow that the line of demarkation between State and national fields of power had nothing to do with the solution.

But it is urged that the Reports abound with cases in which the federal courts, in construing ordinances and statutes, and otherwise ascertaining the rights of parties, resort for light to the common law. It could not be otherwise. The common law is the background against which the outlines of our institutions are drawn, and the foundation upon which the transactions of our race are builded. It is as essential to interpretation as light is to the operations of the microscope. But it is not thereby made the law of the land. Mechanics and medicine are likewise essential to interpretation. Only by looking into their fields can courts accurately ascertain the meaning of many transactions or statutes. They are the settings of transactions and statutes, but do not by reason of that become a part of the law of the land. The law of the land is a rule of civil conduct prescribed by the supreme power in the State. An appeal to the common law for light is entirely distinct from a search of the law of the land for the evidence of a command.

But, it is asked, what law prevails in the Territories and the District of Columbia? The Constitution itself answers. Upon Congress is conferred (art. 1, sect. 8) the right "to exercise exclusive legislation" over the District of Columbia, and all places purchased for the erection of forts, arsenals, etc., and (art. 4, sect. 3) to "make all needful rules and regulations respecting the territory of the United States." Over the area covered by the Territories and the District of Columbia, therefore, there is but one sovereign. The territorial governments are simply the agencies of the nation, and are, in this respect, different from the States. But, as I have pointed out, there is a law of the land attached to every inch of our soil. It is, in some cases, the common law; in others, the civil law, — dependent chiefly upon the character of the earlier dominion extended over it. Now there being but one sovereign, — the nation, — the common law or the civil law, as the case may be, is necessarily attributable to it, as the only supreme power in the State. Here the nation has succeeded to the earlier sovereignties which prescribed the common or civil law as the law of the land. There is, therefore, a common or civil law of the United States over those areas not yet taken into the boundaries of the States.

But there is no inconsistency between this and the position hereinbefore taken. Each inch of soil necessarily has its law of the land, but, in the areas in which the nation and State are coterritorial, the sovereignty to which all law is attributable, except such as is found in the Constitution of the United States and the laws in pursuance thereof, and the treaties, is that of the State. There the common law is not attributable to the United States as sovereign, because neither the Constitution, nor laws of the United States in pursuance thereof, have so adopted it. The distinction, though it might theoretically and speculatively be otherwise, is actual, as shown by the intendments of the Constitution and the doctrine of concurrent jurisdiction already pointed out, and it is only with actualities that the court can deal.

It is also asked, what law is in force upon the navigable waters of the United States, unless there be a general law of the United States? The answer is again found in the Constitution (art. 3, sect. 2), which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. This is an express bestowal, in the fundamental law of the land, of all maritime power and authority, upon one of the departments of the nation. The bestowal is as broad and as exclusive as the power to declare war. It necessarily carries with it the code of rules applicable to maritime jurisdiction. That code is specifically a national code. It is neither common law nor general law. It is, in the language of Justice Bradley, in *The Lottawanna*, 21 Wall. 558, "like international laws, or the laws of war which have the effect of law in any country no further than they are accepted and received as such." The clause is

simply the bestowal upon the nation of a purely national power, self-enforcing by the employment of such rules as the nation alone may prescribe. But beyond this special jurisdiction, carved out of the general jurisdiction, and, for national purposes, bestowed exclusively upon the national government, the laws of the States within whose territories the navigable waters lie are still in force, subject to the exigencies and necessities of the maritime power. The territory covered by the navigable waters is under the law of the land which the proper State may prescribe. The existence, therefore, of this power in the nation, adds nothing to the proposition that there is a United States common law of the land.

But it is said that, if there is no United States common law applying to the field of interstate commerce, there could have been, until the enactment of the Interstate Commerce Act, no law in that field whatever. And it is inferred from this that common carriers within that field, until the enactment of the Interstate Commerce Act, could not have been liable for refusing to receive goods or passengers, or delaying their arrival, or for other like wrongs or delinquencies. It is never safe to argue the existence of a law from the necessities that ought to give rise to it. The sovereign power does not always meet even the apparent needs. And, if law were always to be inferred where needs were found, I fear a diversity as wide as the personal predilections of the judges would be introduced. But the gaping vacuum upon which the argument is predicated does not in fact exist. The power of the nation over interstate commerce is exclusive only in respect of those features where a uniform rule is imperative, — features that are essentially national affairs. In all other respects, until Congress acts, the field of interstate as well as intrastate commerce is occupied by the power and existing laws of the State. Into this latter classification, undoubtedly, would fall the duty of the common carrier to receive all proper goods offered to it for transportation, to make no undue discrimination between shippers of a like class, and to transport with reasonable expedition. There is nothing essentially national in these requirements. They can reasonably be left to the judgment of the local law where the goods are offered. Indeed, the constant and uninterrupted application of such local law to these fields of interstate commerce, through a century, forestalled the need of any national legislation, and constitutes a cogent illustration of the non-existence of a common law attributable to the nation as its sovereign and giver; for, how could the many modifications introduced by the State into these common-law duties and liabilities be effective if there existed also a national common law upon the same subjects, unmodified by Congress, and insusceptible of modification by the States?

Having duly considered these criticisms upon and variations from my former holding by some of the judges of the other circuits, I remain of the opinion that there is no national common or general

law, in the sense of a rule of civil conduct, prescribed by the nation, as sovereign, which can be made the basis of an action to recover back rates, simply because the court may find them to be unreasonable. So far as the existing law applicable to the subject of rates in interstate commerce was concerned, prior to the Interstate Commerce Act, the shipper and the carrier were at liberty to make such contract as they could agree upon; and such a contract would be left untouched, unless for such reasons as would justify the abrogation of contracts between other parties and upon other subjects. This, of course, does not exempt the carrier from the duty of carrying out the contracts actually made. If, between it and the shipper, a specific rate was fixed, such will control; and if no rate was fixed, the ordinary method employed by the law to supply the missing element of the contract is to be followed. If no rate was fixed, and the shipment was not made in contemplation of any specific rate, the implications of the law are that the parties intended a reasonable rate; and the exaction in such cases of an unreasonable rate can be made the basis of a recovery, not because of the existence of any law which prohibits the exaction of unreasonable rates generally, but because, in the particular case in hand, the exact rate is the omitted element of the contract, and must therefore be supplied by the implications of the law.

The majority of the counts in the declaration under consideration proceed expressly upon the theory that, irrespective of the contract between the parties, the law prohibited the exaction of unreasonable rates, and allowed their recovery back upon a showing of the fact. To these counts, in my opinion, a demurrer ought to be sustained. Several of the counts are evidently drawn upon the theory that no specific rate was at the time agreed upon, or in contemplation, and that in view of this the rate actually exacted, being unreasonable, was contrary to the element of the contract read into it by the implications of the law. So far as these counts relate to shipments prior to the Interstate Commerce Act, they present some difficulties, and especially so, in view of the fact that they compress into single averments the different shipments of months and years, each of which must necessarily have been distinct from the other, and properly subject to distinct contracts or rates in contemplation. So far as these counts relate to shipments after the Interstate Commerce Act, I am clear that, in absence of the averment that no rates were published and in existence as is required by the law, the actions would not lie. By requiring the fixing and publication of these rates, the Interstate Commerce Act supplies at least *prima facie* evidence of the contract rate, which can only be overcome by averment in avoidance thereof. One of the counts proceeds upon the theory of unjust discrimination between shippers, but whether it alleges with sufficient preciseness that the discrimination was between shippers who, by reason of contemporaneousness of shipment, route traversed, and



character of product shipped, were entitled to like rates, does not clearly appear.

My conclusion, on the whole, is to sustain the motion, and allow the demurrers to be filed, intending to sustain the demurrers to all the counts, except those relating to discrimination, and those relating to shipments prior to the Interstate Commerce Act, which proceed upon the idea that an express contract for rates was not concluded, but was left to the implications of the law. On the counts of this character, I will hear the demurrer, to determine if the allegations of the count are sufficiently specific and single to bring them within the right of recovery.

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WESTERN UNION TELEGRAPH CO. v. CALL  
PUBLISHING CO.

SUPREME COURT OF THE UNITED STATES. 1901.

[*Reported 181 United States, 92.*]

THIS was an action commenced on April 29, 1891, in the District Court of Lancaster County, Nebraska, by the Call Publishing Company, to recover sums alleged to have been wrongfully charged and collected from it by the defendant, now plaintiff in error, for telegraphic services rendered. According to the petition the plaintiff had been engaged in publishing a daily newspaper in Lincoln, Nebraska, called *The Lincoln Daily Call*. The *Nebraska State Journal* was another newspaper published at the same time in the same city, by the *State Journal Company*. Each of these papers received Associated Press despatches over the lines of the defendant. The petition alleged:

“4th. That during all of said period the defendant wrongfully and unjustly discriminated in favor of the said *State Journal Company* and against this plaintiff, and gave to the *State Journal Company* an undue advantage, in this: that while the defendant demanded, charged, and collected of and from the plaintiff for the services aforesaid seventy-five dollars per month for such despatches, amounting to 1500 words or less daily, or at the rate of not less than five dollars per 100 words daily per month, it charged and collected from the said *State Journal Company* for the same, like, and contemporaneous services only the sum of \$1.50 per 100 words daily per month.

“Plaintiff alleges that the sum so demanded, charged, collected, and received by the said defendant for the services so rendered the plaintiff, as aforesaid, was excessive and unjust to the extent of the amount of the excess over the rate charged the said *State Journal Company* for the same services, which excess was three dollars and fifty cents per one hundred words daily per month, and to that extent it was an unjust and wrongful discrimination against the plaintiff and in favor of the *State Journal Company*.

“That plaintiff was at all times and is now compelled to pay said excessive charges to the defendant for said services or to do without the same; that plaintiff could not dispense with such despatches without very serious injury to its business.”

The telegraph company's amended answer denied any unjust discrimination; denied that the sums charged to the plaintiff were unjust or excessive, and alleged that such sums were no more than a fair and reasonable charge and compensation therefor, and similar to charges made upon other persons and corporations at Lincoln and elsewhere for like services. The defendant further claimed that it was a corporation, engaged in interstate commerce; that it had accepted the provisions of the act of Congress entitled “An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal and other purposes,” approved July 24, 1866; that it had constructed its lines under the authority of its charter and that act, and denied the jurisdiction of the courts of Nebraska over this controversy. A trial was had, resulting in a verdict and judgment for the plaintiff, which judgment was reversed by the Supreme Court of the State. 44 Neb. 326. A second trial in the District Court resulted in a verdict and judgment for the plaintiff, which was affirmed by the Supreme Court of the State (58 Neb. 192), and thereupon the telegraph company sued out this writ of error.

BREWER, J.<sup>1</sup> The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not at the time these services were rendered prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that therefore, there being no controlling statute or common law, the State court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal company. In the brief of counsel it is said: “The contention was consistently and continuously made upon the trial by the telegraph company that, as to the State law, it could not apply for the reasons already given, and that, in the absence of a statute by Congress declaring a rule as to interstate traffic by the telegraph company, such as was appealed to by the publishing company, there was no law upon the subject.” The logical result of this contention is that persons dealing with common carriers engaged in interstate commerce and in respect to such commerce are absolutely at the mercy of the carriers. It is true counsel do not insist that the telegraph company or any other company engaged in interstate commerce may charge or contract for unreasonable rates, but they do not say that they may not, and if there be neither statute nor common law control-

<sup>1</sup> Part of the opinion, in which the charge of the court at the trial was given, is omitted. — Ed.

ling the action of interstate carriers, there is nothing to limit their obligation in respect to the matter of reasonableness. We should be very loath to hold that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services; and if there be no law to restrain, the necessary result is that there is no limit to the charges they may make and enforce. . . . Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no federal common law, and that such has been the ruling of this court; there was no federal statute law at the time applicable to this case, and as the matter is interstate commerce, wholly removed from State jurisdiction, the conclusion is reached that there is no controlling law, and the question of rates is left entirely to the judgment or whim of the telegraph company.

This court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the States. It has also held that the inaction of Congress is indicative of its intention that such interstate commerce shall be free, and many cases are cited by counsel for the telegraph company in which these propositions have been announced. Reference is also made to opinions in which it has been stated that there is no federal common law different and distinct from the common law existing in the several States. Thus, in *Smith v. Alabama*, 124 U. S. 465, 478, it was said by Mr. Justice Matthews, speaking for the court:

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from

that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment.' This is illustrated by the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of that State," p. 478.

Properly understood, no exceptions can be taken to declarations of this kind. There is no body of federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

What is the common law? According to Kent: "The common law includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature." 1 Kent, 471. As Blackstone says: "Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom. This unwritten, or common, law, is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification." 1 Blackstone, 67. In Black's Law Dictionary, page 232, it is thus defined: "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the

statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment.

But this question is not a new one in this court. In *Interstate Commerce Commission v. Baltimore & Ohio Railroad*, 145 U. S. 263, 275, a case which involved interstate commerce, it was said by Mr. Justice Brown, speaking for the court:

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the interstate commerce act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of common law applicable to common carriers."

In *Bank of Kentucky v. Adams Express Co.*, and *Planters' Bank v. Express Co.*, 93 U. S. 174, 177, the express companies received at New Orleans certain packages for delivery at Louisville. These were interstate shipments. In the course of transit the packages were destroyed by fire, and actions were brought to recover the value thereof. The companies defended on the ground of an exemption from liability created by the contracts under which they transported the packages. Mr. Justice Strong, delivering the opinion of the court after describing the business in which the companies were engaged, said:

"Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers."

And then proceeded to show that they could not avail themselves of the exemption claimed by virtue of the clauses in the contract. The whole argument of the opinion proceeds upon the assumption that the common-law rule in respect to common carriers controlled.

Reference may also be made to the elaborate opinion of District Judge Shiras, holding the Circuit Court in the Northern District of Iowa, in *Murray v. Chicago & Northwestern Railway*, 62 Fed. Rep. 24, in which is collated a number of extracts from opinions of this court, all tending to show recognition of a general common law existing throughout the United States, not, it is true, as a body of law distinct from the common law enforced in the States, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and principles are set aside by express statute. It would serve no good purpose to here repeat those quotations; it is enough to refer to the opinion in which they are collated.

It is further insisted that even if there be a law which controls there is no evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained. But there was testimony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination. And

questions of fact, as has been repeatedly held, when once settled in the courts of a State, are not subject to review in this court. *Dower v. Richards*, 151 U. S. 658; *Egan v. Hart*, 165 U. S. 188; *Chicago, Burlington, etc. Railroad v. Chicago*, 166 U. S. 226-242; *Hedrick v. Atchison, Topeka & Santa Fé Railroad*, 167 U. S. 673, 677; *Gardner v. Bonestell*, 180 U. S. 362.

These are the only questions of a federal nature which are presented by the record, and finding no error in them the judgment of the Supreme Court of Nebraska is

*Affirmed.*

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## SECTION IV.

### THE NATURE OF FOREIGN LAW.

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## HAVEN *v.* FOSTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1829.

[*Reported 9 Pickering, 112.*]

MORTON, J.<sup>1</sup> By the statute of distributions of this State these heirs, standing in the same degree of relationship to the intestate, inherited his estate in equal proportions. But by the statute of New York, which carries the doctrine of representation farther than the law of this State, or, indeed, than the civil or common law, these heirs inherited *per stirpes* and not *per capita*. So that the estate in New York descended, one half to the wife of the plaintiff, and the other half to the defendant and his two brothers; being one sixth instead of one quarter to each.

Of the provisions and even existence of this statute, all the heirs were entirely ignorant during the whole of the transactions stated in the case. The plaintiff having discovered the mistake, now seeks by this action to reclaim of the defendant one third of the amount received by him on account of the sale of the New York lands, with interest from the time of its receipt. And the question now submitted to our decision is, whether he is entitled to a repetition of the whole or any part of this amount.

Had the parties been informed of their respective rights under the laws of New York, it cannot be doubted that the plaintiff would have retained one moiety of the land in that State, or would have received to himself one half of the consideration for which it was sold. The

<sup>1</sup> The statement of facts, arguments of counsel, and parts of the opinion involving other questions, are omitted. — Ed.

distribution of the avails of the sale was made by the heirs upon the confident though mistaken supposition, that they were equally entitled to them. They acted in good faith, upon a full conviction that they were equal owners of the estate. It turned out, however, to the surprise of all of them, that they owned the estate in very unequal proportions, and that the defendant and his brothers had received not only the price of their own estate, but also the price of a part of the plaintiff's estate.

Equity would therefore seem to require, that the defendant should restore to the plaintiff the amount received for the plaintiff's estate. It was received by mistake, and but for the mistake would not have come to the defendant's hands. If the whole estate had been owned by the plaintiff, and the defendant, having no interest in it, had received the whole consideration, the equitable right of repetition would have been no stronger; it might have been more manifest. . . .

That a mistake in fact is a ground of repetition is too clear and too well settled to require argument or authority in its support.

The misapprehension or ignorance of the parties to this suit related to a statute of the State of New York. Is this, in the present question, to be considered *fact* or *law*?

The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign State is the same as it is here. 2 Stark. Ev. (Metcalf's ed.), 568; *Male v. Roberts*, 3 Esp. Rep. 163. If a foreign law is unwritten, it may be proved by parol evidence; but if written, it must be proved by documentary evidence. *Kenny v. Clarkson*, 1 Johns. R. 385; *Frith v. Sprague*, 14 Mass. R. 455; *Consequa v. Willings*, 1 Peters's C. R. 229. The laws of other States in the Union are in these respects foreign laws. *Raynham v. Canton*, 3 Pick. 293.

The courts of this State are not presumed to know the laws of other States or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them. But when established by legal proof, they are to be construed by the same rules and to have the same effect upon all subjects coming within their operation, as the laws of this State.

That the *lex loci rei sitæ* must govern the descent of real estate, is a principle of our law, with which every one is presumed to be acquainted. But what the *lex loci* is, the court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private indi-

viduals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est, cum jus nostrum ignoramus*, and does not extend to foreign laws or the statutes of other States.

We are of opinion, that in relation to the question now before us, the statute of New York is to be considered as a fact, the ignorance of which may be ground of repetition. And whether *ignorantia legis* furnishes a similar ground of repetition, either by the civil law, the law of England, or the law of this commonwealth, it is not necessary for us to determine.

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### KLINE v. BAKER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[Reported 99 Massachusetts Reports, 253.]

GRAY, J. This action of replevin is brought by the seller of intoxicating liquors against a deputy sheriff attaching the same as the property of the purchaser. The plaintiff contends that the sales were induced by fraud of the purchaser and therefore passed no title to him; and the burden of proving this proposition is upon the plaintiff.

The seller resided in Pennsylvania, and the purchaser in Illinois. The goods were sold in two lots, one in June and the other in August, 1865, upon distinct orders sent by the purchaser to the seller. Although the first order was in accordance with terms of sale agreed on between the agents of the parties in Illinois, neither sale was complete until delivery of the goods. That delivery in each case was made to a railroad corporation in Philadelphia, which, in the absence of any agreement between the parties to the contrary, was in law a delivery to the purchaser. Each contract of sale therefore was completed in Pennsylvania, and its validity must be governed by the laws of that State. *Orentt v. Nelson*, 1 Gray, 536; *Finch v. Mansfield*, 97 Mass. 89: 2 Kent Com. (6th ed.) 458.

The laws of another State are not laws of this Commonwealth, which our citizens are bound to know, or of which our courts have judicial knowledge; but they are facts, of which both citizens and courts must be informed as of other facts. As foreign laws can only be known so far as they are proved, no evidence of them can be admitted at the argument before this court, which was not offered at the trial or otherwise made part of the case reserved. *Knapp v. Abell*, 10 Allen, 485; *Bowditch v. Soltyk*, 99 Mass. 138. When the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. *Holman v. King*, 7 Met. 384; *Dyer v. Smith*, 12 Conn. 384; *Moore v. Gwynn*, 5 Ired. 187; *Ingra-*



ham *v.* Hart, 11 Ohio, 255. But the qualifications of the experts, or other questions of competency of witnesses or evidence, must be passed upon by the court; and when the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone. *Church v. Hubbard*, 2 Cranch, 187; *Ennis v. Smith*, 14 How. 400; *Owen v. Boyle*, 15 Maine, 147; *State v. Jackson*, 2 Dev. 563; *People v. Lambert*, 5 Mich. 349; *Bremer v. Freeman*, 10 Moore P. C. 306; *Di Sora v. Phillipps*, 10 H. L. Cas. 624. And if the evidence is uncontradicted, and will not support the action, it is the duty of the court so to instruct the jury.

By the law of Massachusetts, purchasing goods with an intention not to pay for them is of itself a fraud which will render the sale void and entitle the seller to reclaim the goods. *Dow v. Sanborn*, 3 Allen, 181. The only evidence introduced at the trial, of the law of Pennsylvania upon this subject was the cases of *Smith v. Smith*, 21 Penn. State, 317, and *Backentoss v. Speicher*, 31 Penn. State, 324, as published in the official reports, by which it appears that, in the opinion of the Supreme Court of that State, there must be "artifice, intended and fitted to deceive, practised by the buyer upon the seller," in order to constitute such a fraud as will make the sale void; and that the buyer's intention not to pay for the goods and concealment of his own insolvency is not such a fraud. These reports were competent, and, in the absence of all other evidence, conclusive proof, of the law of Pennsylvania. Gen. Sts. c. 131, § 64. *Penobscot & Kenebec Railroad Co. v. Bartlett*, 12 Gray, 244.

But the plaintiff introduced evidence that Burleigh, who was either a partner or the manager of the business of Dore, the purchaser, represented to Sheble, the agent of the plaintiff, at the time of negotiating with him for the purchase of the first lot of liquors, and within ten days before sending the order for them to Philadelphia, that Dore had a farm worth ten thousand dollars, and other means amply sufficient to carry on his business, and that he always purchased for cash and did not owe any man; and that these representations were false. This was clearly sufficient evidence of fraudulent representations intended to induce and in fact inducing the plaintiff to sell to Dore, or, in the language of the Supreme Court of Pennsylvania, "artifice, intended and fitted to deceive, practised by the buyer upon the seller," to warrant a jury in finding that the purchase made immediately afterwards on a credit of sixty days, as well as the subsequent purchase made before that credit had expired, was fraudulent and passed no title. The learned judge therefore erred in ruling that upon the evidence the plaintiff could not recover, and in directing a verdict for the defendant. *Nichols v. Pinner*, 18 N. Y. 295, and 23 N. Y. 264; *Hall v. Naylor*, 18 N. Y. 588; *Reenie v. Parthemere*, 8 Penn. State, 460; *Seaver v. Dingley*, 4 Greenl. 306; *Wiggin v. Day*, 9 Gray, 97.

*Exceptions sustained.*

STORY, J., in *OWINGS v. HULL*, 9 Pet. 607 (1835). [In error to the Circuit Court for the District of Maryland.] We are of opinion that the Circuit Court was bound to take judicial notice of the laws of Louisiana. The Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union in cases to which they respectively apply. The judicial power conferred on the general government by the Constitution extends to many cases arising under the laws of the different States. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. That jurisprudence is, then, in no just sense, a foreign jurisprudence, to be proved, in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.

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BRADLEY, J., in *UNITED STATES v. PEROT*, 98 U. S. 428 (1879). We are bound to take judicial notice that the Mexican league was not the same as the American league. The laws of Mexico, of force in Texas previous to the Texan Revolution, were the laws not of a foreign, but of an antecedent government, to which the Government of the United States, through the medium of the Republic of Texas, is the direct successor. Its laws are not deemed foreign laws; for as to that portion of our territory they are domestic laws; and we take judicial notice of them. *Fremont v. U. S.*, 17 How. 542, 557.

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## FOREPAUGH v. DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA. 1889.

[*Reported 128 Pennsylvania State Reports, 217.*]

MITCHELL, J. Plaintiff, being the proprietor of a circus, made a special contract with defendant for the transportation of a number of his own cars, upon certain conditions and terms elaborately set out in writing, among which was a stipulation that, in consideration that the service was to be performed "for much less than the ordinary, usual, and legal rates charged other parties for a like amount of transportation," the plaintiff released the defendant from all liability for or on account of loss, damage, or injury to any of the animals, property, or things thus transported, "although such loss, damage, or injury may

be caused by the negligence of the [defendant], its agents or employes." Damage having occurred by the negligence of defendant, plaintiff brought this suit, and the sole question before us is whether it can be maintained in the face of the stipulation above set forth.

The contract was made, was to be performed, and the alleged breach occurred, in New York. No possible element was wanting, therefore, to make it a New York contract. It is admitted that in New York the stipulation is valid, and this action could not be maintained. *Cragin v. Railroad Co.*, 51 N. Y. 61; *Mynard v. Railroad Co.*, 71 N. Y. 180; *Wilson v. Railroad Co.*, 97 N. Y. 87. Why, then, should plaintiff, by stepping across the boundary into Pennsylvania, acquire rights which he has not paid for, and his contract does not give him?

It is argued that the validity of this contract is a question of commercial law, and therefore the mere decisions of the New York courts are not binding; and, in the absence of any statute in New York expressly authorizing such a contract, the courts of this State must follow their own views of the commercial as part of the general common law, though different views may be held as to such law by the courts of New York. This is the main argument of the plaintiff, and, as it is one which is frequently advanced, and affects a number of important questions, it is time to say plainly that it rests upon an utterly inadmissible and untenable basis. There is no such thing as a general commercial or general common law, separate from, and irrespective of, a particular State or government whose authority makes it law. Law is defined as a rule prescribed by the sovereign power. By whom is a general commercial law prescribed, and what tribunal has authority or recognition to declare or enforce it, outside of the local jurisdiction of the government it represents? Even the law of nations, the widest reaching of all, is a law only in name. It has but a moral sanction, and the only tribunal that undertakes to enforce it is the armed hand, the *ultima ratio regum*. The so-called commercial law is likewise a law only in name. Upon many questions arising in the business dealings of men, the laws of modern civilized States are substantially the same; and it is therefore common to say that such is the commercial law, but, except as a convenient phrase, such general law does not exist. There must be a State or government, of which every law can be predicated, and to whose authority it owes its existence as law. Without such sanction, it is not law at all; with such sanction, it is law without reference to its origin, or the concurrence of other States or people. Such sanction it is the prerogative of the courts of each State themselves to declare. Their jurisdiction is final and exclusive, and in this respect there is no distinction between statute and common law. It is universally conceded that, as to statutes, the decisions of the State courts are binding upon all other tribunals, yet such decisions have no higher sanction than those upon the common law; for what the latter determine, equally with the former, is the law of the particular State. The law of Pennsylvania consists of the Constitution.

treaties, and statutes of the United States, the Constitution and statutes of this State, and the common law, not of any or all other countries, but of Pennsylvania. There is a common law of England, and a common law of Pennsylvania mainly founded thereon, but with certain differences; and the only tribunal competent to pass authoritatively on such differences is a Pennsylvania court. To take a familiar illustration: In the United States the universal doctrine has always been that the English colonists brought with them, and made part of their laws, all the common law of England that was not unsuited to their new situation. No part of the common law of England is better settled than the doctrine of ancient lights. The Court of Chancery of New Jersey, in *Robeson v. Pittenger*, 2 N. J. Eq. 57 (1838), held that the same doctrine was part of the common law of New Jersey. The Supreme Court of Pennsylvania, on the other hand, starting with the same premises, and reasoning on the same principles but, proceeding cautiously from the dictum of Rogers, J., in *Hoy v. Sterrett*, 2 Watts, 331 (1834), to the unanimous decision of the court in *Haverstick v. Sipe*, 33 Pa. St. 368 (1859), held that the doctrine of ancient lights by prescription was not part of the common law of Pennsylvania. No tribunals of any other State presume to question that the common law of New Jersey and the common law of Pennsylvania differ on this point. What is law in one State is not law in the other, not because it was or was not the common law of England, but because it is or is not the law of the respective States; and, though it rests only on the decisions of the courts, it is none the less absolutely and indisputably the law, than if it had been made so by statute. I have purposely selected an illustration from the law relating to real estate, because, if I took one from the commercial law, it might seem like assuming the very question under discussion. But the example is none the less pertinent. The point is the force of judicial decisions on the common law, and the assumption that there is any tenable basis for holding them less binding upon such law than upon statutes. The so-called commercial law derives all its force from its adoption as part of the common law, and a decision on the commercial law of a State stands upon precisely the same basis as a decision upon any other branch of the common law. The only ground upon which any foreign tribunal can question either is that it does not agree with the premises or the reasoning of the court. But the same ground would enable it to question a decision upon a statute because a different construction seemed to it nearer the true intent of the legislative language, and this, it is universally conceded, no foreign court can do. There is no difference in principle. The decisions of a State court, upon its common law and on its statutes, must stand unquestioned, because it is the only authority competent to decide; or they must be alike questionable by any tribunal which may choose to differ with its reasons or its conclusions.

It is not probable that the doctrine of such a distinction would ever have got a foothold in jurisprudence, and it would certainly have been

long ago abandoned. had it not been for the unfortunate misstep that was made in the opinion in *Swift v. Tyson*, 16 Pet. 1. Since then the courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the State where the question arose. It is argued now that, as to such questions, the State courts also have similar liberty. It would be sufficient answer to this argument that such a course, by reading into a contract a new duty not in contemplation of the parties, and not part of it by the law of the place where it is made, is, in principle and in practical effect, impairing the obligation of the contract, which even the sovereign power of a State is prohibited from doing. But we prefer to rest the matter on the broader ground that the doctrine itself is unsound. The best professional opinion has long regarded it as indefensible on principle, and is thus very recently summed up by the most learned of living jurists: "Questions growing out of contracts made and to be performed in a State are decided by the national court of last resort, not in accordance with the unwritten or customary law of the State where they originated, as expounded by its courts, but agreeably to some theoretic view of a general commercial law, which does not exist, and is not to be found in the books. The State courts, on the other hand, adhere to their own precedents, and do not consider themselves entitled to impair the obligation of contracts that have been made in reliance on the principles which they have laid down through a long series of years. The result is a conflict of jurisdiction which there are no means of allaying. . . . Whether a recovery shall be had on a promissory note which has been taken as collateral security for an antecedent debt against a maker from whom it was obtained by fraud, is thus made to turn in New York, Pennsylvania, and Ohio, not on any settled rule, but on the tribunal by which the cause is heard; and, if that is federal, the plaintiff will prevail; if it is local, the defendant. Such a result tends to discredit the law. . . . The enumeration might be carried further, but enough has, perhaps, been said to show that no uniform rule can be deduced from the decisions of the English and American courts under the commercial law, and that the certainty requisite to justice can be obtained only by following the local tribunals as regards the contracts made in each locality. The several States of this country are collectively one nation, but they are as self-governing in all that concerns their purely internal commerce as if the general government did not exist; and when the will of the people of New York or Pennsylvania is declared on such matters, through their representatives in the local legislatures, expressly or by long-continued acquiescence in the rules enunciated by their judges, it cannot be set aside by Congress short of an amendment of the Constitution. Had the New York legislature declared that notes made and negotiated in that State should follow the rule laid down in *Coddington v. Bay* [20 Johns. 637], the federal tribunals would have been bound to carry it into effect, notwithstanding any attempt of the national legislature

to introduce a different principle; and it is inconceivable that the judicial department of the government can exercise a greater authority in this regard than the legislature." Hare, *Const. Law*, 1107, 1117, and see Lecture 51, *passim*.

We conclude, therefore, that the distinction between the binding effect of decisions on commercial law and on statutes is utterly untenable; that the law declared by State courts to govern on contracts made within their jurisdiction is conclusive everywhere; and the departure made by the United States courts is to be regretted, and certainly not to be followed. In entire accordance with this view are our own cases of *Brown v. Railroad Co.*, 83 Pa. St. 316, and *Brooke v. Railroad Co.*, 108 Pa. St. 530, 1 Atl. Rep. 206; and the decisions in Ohio: *Knowlton v. Railway Co.*, 19 Ohio St. 260; in Illinois: *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Railroad Co. v. Smith*, 74 Ill. 197; in Iowa: *Talbott v. Transportation Co.*, 41 Iowa, 247; *Robinson v. Transportation Co.*, 45 Iowa, 470; in Connecticut: *Hale v. Navigation Co.*, 15 Conn. 539; in Kansas: *Railroad Co. v. Moore*, 29 Kan. 632; in South Carolina: *Bridger v. Railroad Co.*, 27 S. C. 462, 3 S. E. Rep. 860; in Georgia: *Railroad Co. v. Tanner*, 68 Ga. 390; in Mississippi: *McMaster v. Railroad Co.*, 65 Miss. 271, 4 South. Rep. 59; in Texas: *Cantu v. Bennett*, 39 Tex. 303; *Ryan v. Railway Co.*, 65 Tex. 13, and perhaps in other States. I will not notice them in detail further than to quote the terse and forcible summary made by Scott, J., in *Knowlton v. Railway Co.*: "As the contract was made within the jurisdiction of New York, and contemplated no action outside of that jurisdiction, it is clear that the question of its validity must be determined solely by the laws of New York. The rights and obligations of the parties to such a contract, and in respect to the manner of its execution, cannot be affected by the laws or policy of other States. If no cause of action arose to the plaintiff under his contract when the accident occurred, the transaction cannot be converted into a cause of action by the fact that the parties have subsequently come within the jurisdiction of Ohio." Holding, therefore, that the validity of this contract is to be determined by the law of New York, as decided by the courts of that State, is there any reason why the courts of this State should not enforce it? The general rule is that courts will enforce contracts valid by the law of the place where made, unless they are injurious to the interests of the State, or of its citizens. Story, *Conf. Laws*, §§ 38, 244. The injury may be indirect by offending against justice or morality, or by tending to subvert settled public policy (2 Kent, Com. 458; *Greenwood v. Curtis*, 6 Mass. 358; *Bliss v. Brainard*, 41 N. H. 256); but this does not imply that courts will not sustain contracts that would not be valid if made within their jurisdiction, or will not enforce rights that could not be acquired there. Thus, for example, the courts of Pennsylvania have always enforced contracts for a higher rate of interest than would be valid under the laws of this State. *Ralph v. Brown*, 3 Watts & S. 395; *Wood v. Kelso*, 27 Pa. St. 243; *Irvine v. Barrett*, 2 Grant, Cas. 73. The con-

tract in the present case does not directly affect the State or its citizens in any way. Nor is it in any way contrary to justice or morality. It may be doubted whether it is even so far contrary to the policy of the State that it would have been invalid if it had been made here. It has some exceptional features, which, it is argued, take it out of the ordinary rules governing the contracts of common carriers; and the case of *Coup v. Railroad Co.*, 56 Mich. 111, 22 N. W. Rep. 215, is a strong authority for that position. But without stopping to discuss that point, which our general view renders unnecessary, it is sufficient to say that, even if it would not have been valid if made here, its enforcement as a New York contract does not in any way derogate from the laws of Pennsylvania, or injure or affect the policy of the State, any more than would a foreign contract for what would be usurious interest here, and that, as already said, the courts have never hesitated to enforce.

The argument of duress may be briefly dismissed for want of any evidence in the case to sustain it. There is no evidence that defendant was unwilling to accept the ordinary and usual rates for the transportation of plaintiff's cars and property. If they had been offered by plaintiff and refused, there might have been some ground for the present argument, though, in view of the peculiar nature of the property, and the special facilities required, even that is far from clear. But in fact plaintiff got a large reduction of rates, and part of the consideration for such reduction was the agreement that he should be his own insurer against loss by accident. There was nothing compulsory about such a contract, and plaintiff comes now with a very bad grace to assert a right that he expressly relinquished for a substantial consideration.

The learned court below was right in entering judgment for the defendant on the facts found in the special verdict.

*Judgment affirmed.*

WILLIAMS, J. (*dissenting*). I dissent from the judgment in this case because I cannot agree that a well-settled rule of public policy of this commonwealth must give way to considerations of mere comity. The contract set up as a defence to this action is a release to a common carrier from liability for its own negligence. It is well settled in this State that such a release is against public policy. Comity does not require more of us than to give effect to the *lex loci contractus*, when not subversive of the public policy of our own State. This has been distinctly held by the Court of Appeals of New York, in which this release was executed, and in whose behalf comity is asked. I would follow the Court of Appeals, because comity can require no more of us in any given case than the courts of the place of the contract would yield to us for comity's sake, and because I believe the rule to rest on solid ground.

STERRETT, J., concurs in the foregoing dissent.

## ST. NICHOLAS BANK v. STATE NATIONAL BANK.

COURT OF APPEALS OF NEW YORK. 1891.

[Reported 128 *New York Reports*, 26.]

EARL, J.<sup>1</sup> This action was brought to recover the proceeds of a draft for \$473.57 sent for collection by the plaintiff to the defendant, and paid to the defendant's correspondents. The trial resulted in the direction of a verdict for the plaintiff for the amount demanded. Upon appeal to the general term, the judgment entered upon the verdict was reversed, and a new trial ordered. From the order of reversal the plaintiff appealed to this court. . . .

The rule has long been established in this State that a bank receiving commercial paper for collection, in the absence of a special agreement, is liable for a loss occasioned by the default of its correspondents or other agents selected by it to effect the collection. *Allen v. Bank*, 22 Wend. 215; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Naser v. Bank*, 116 N. Y. 498, 22 N. E. Rep. 1077. And the same rule prevails in some of the other States, in the United States Supreme Court, and in England. *Titus v. Bank*, 35 N. J. Law, 588; *Wingate v. Bank*, 10 Pa. St. 104; *Reeves v. Bank*, 8 Ohio St. 465; *Tyson v. Bank*, 6 Blackf. 225; *Simpson v. Waldby* (Mich.), 30 N. W. Rep. 199; *Mackersy v. Ramsays*, 9 Clark & F. 818. In such a case the collecting bank assumes the obligation to collect and pay over or remit the money due upon the paper, and the agents it employs to effect the collection, whether they be in its own banking-house or at some distant place, are its agents, and in no sense the agents of the owner of the paper. Because they are its agents, it is responsible for their misconduct, neglect, or other default. . . .

The defendant, however, claims that the contract with the plaintiff is to be treated as a Tennessee contract, and that by the law of that State it cannot be made liable for this loss. Upon the trial, for the purpose of showing the law of that State, it put in evidence a decision of the Supreme Court in the case of *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101. . . . That decision was not based upon any statute law, but upon the principles of the common law, supposed to be applicable to the facts of the case. It did not make or establish law, but expounded the law, and furnished some evidence of what the law applicable to that case was,—evidence which other courts might or might not take and receive as reliable and sufficient; and even the same court, upon fuller discussion and more mature consideration, might, in some subsequent case, refuse to take the same view of the law. There is no common law peculiar to Tennessee. But the

<sup>1</sup> Part of the opinion is omitted. — ED.



common law there is the same as that which prevails here and elsewhere, and the judicial expositions of the common law there do not bind the courts here. The courts of this State, and of other States, and of the United States, would follow the courts of that State in the construction of its statute law. But the courts of this State will follow its own precedents in the expounding of the general common law applicable to commercial transactions, and so it has been repeatedly held. *Faulkner v. Hart*, 82 N. Y. 413; *Swift v. Tyson*, 16 Pet. 1; *Oates v. Bank*, 100 U. S. 239; *Ray v. Gas Co.*, 20 Atl. Rep. 1065 (decided in Pennsylvania Supreme Court, Jan. 12, 1891). We must, therefore, hold that the obligation resting upon the defendant was that which the principles of the common law, as expressed by the courts of this State, placed upon it. If it be said that the contract between these parties was made in view of the common law, then we must hold that it was the common law as expounded here.

But it cannot be maintained that the contract between these parties was a Tennessee contract. It is by no means clear, even, that it can be held that the contract was made there.<sup>1</sup> . . .

Our conclusion, therefore, is that the order of the general term should be reversed, and the judgment entered upon the verdict affirmed with costs. All concur.

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## SECTION V.

### COMITY.

MARSHALL, C. J., in *The Nereide*, 9 Cr. 388, 422 (1815). The court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them its unjust proceedings towards our citizens, is a political, not a legal measure. It is for the consideration of the government, not of its courts. The degree and kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics.

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TANEY, C. J., in *BANK OF AUGUSTA v. EARLE*, 13 Pet. 519, 589 (1839). It is needless to enumerate here the instances in which, by the general

<sup>1</sup> The court found that the contract was not a Tennessee contract. — ED.

practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. . . . The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said in Story's *Conflict of Laws*, 37, that "In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

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GRAY, J., in *HILTON v. GUYOT*, 159 U. S. 113, 163 (1895). No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticised, no satisfactory substitute has been suggested.

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.<sup>1</sup>

<sup>1</sup> See the dissenting opinion of FULLER, C. J., in the same case, at p. 233; and see further Dicey on the *Conflict of Laws*, p. 10. — ED.

CHAPTER II.  
JURISDICTION OVER PERSONS AND THINGS.

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SECTION I.

DOMICILE.<sup>1</sup>

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BELL *v.* KENNEDY.

HOUSE OF LORDS. 1868.

[*Reported Law Reports, 1 House of Lords (Scotch), 307.*]

THE LORD CHANCELLOR (LORD CAIRNS).<sup>2</sup> My Lords, this appeal arises in an action commenced in the Court of Session, I regret to say so long ago as the year 1858; in the course of which action no less than sixteen interlocutors have been pronounced by the court, all, or the greater part of which, become inoperative or immaterial if your Lordships should be unable to concur in the view taken by the court below of the question of domicile.

The action is raised by Captain Kennedy, and his wife, the daughter of the late Mrs. Bell; and the defender is Mrs. Kennedy's father, the husband of Mrs. Bell. The claim is for the share, said to belong to Mrs. Kennedy, of the goods held in communion between Mr. and Mrs. Bell. This claim proceeds on the allegation that the domicile of Mrs. Bell, at the time of her death on the 28th of September, 1838, was in Scotland. And the question itself of her domicile at that time depends upon the further question, what was the domicile of her husband? Her husband, the appellant, is still living; and your Lordships have therefore to consider a case which seldom arises, the question, namely, of the domicile at a particular time of a person who is still living.

Mr. Bell was born in the island of Jamaica. His parents had come there from Scotland, and had settled in the island. There appears to be no reason to doubt but that they were domiciled in Jamaica. His father owned and cultivated there an estate called the

<sup>1</sup> For the general principles of nationality see *Calvin's Case*, 7 Co. 1; *U. S. v. Wong Kim Ark*, 169 U. S. 649. — Ed.

<sup>2</sup> The statement of facts is omitted, as are also the concurring opinions of Lords CRANWORTH, CHELMSFORD, and COLONSAY. — Ed.

Woodstock estate. His mother died when the appellant was about the age of two years, and immediately after his mother's death he was sent to Scotland for the purpose of nurture and education. By his father's relatives he was educated in Scotland at school, and he afterwards proceeded to college. His father appears to have died when he was about the age of ten years, dying, in fact, as he was coming over to Great Britain for his health, but with the intention of returning to Jamaica.

The appellant, after passing through college in Scotland, travelled upon the Continent; and soon after he attained the age of twenty-one years he went out again to Jamaica, in the year 1823, with the intention of carrying on the cultivation of the Woodstock estate, which, in fact, was the only property he possessed. He cultivated this estate and made money to a considerable amount. He arrived at a position of some distinction in the island. He was the custos of the parish of St. George, and was a member of the Legislative Assembly. He married his late wife, then Miss Hosack, in Jamaica in the year 1828; and he had by her, in Jamaica, three children.

It appears to me to be beyond the possibility of doubt that the domicile of birth of Mr. Bell was in Jamaica, and that the domicile of his birth continued during the events which I have thus described.

In the year 1834 a change was made in the law with regard to slavery in the island of Jamaica, which introduced, in the first instance, a system of apprenticeship, maturing in the year 1838 into a complete emancipation. This change appears to have been looked upon by Mr. Bell with considerable disfavor, and, his health failing, in the year 1837 he determined to leave Jamaica, and to return to some part, at all events, of Great Britain. He entered into a contract for the sale of the Woodstock estate, the purchase-money being made payable by certain instalments; and in 1837 he left the island, to use his own expression, "for good." He abandoned his residence there without any intention at that time, at all events, of returning to the island. He reached London in the month of June, 1837. He remained in London for a short time, apparently about ten days, and he then went on to Edinburgh, and took up his abode under the roof of the mother of his wife, Mrs. Hosack, who at that time was living in Edinburgh.

I ought to have stated that while the appellant was in Jamaica he appears to have kept up a correspondence with his relatives and friends in Scotland. In the year 1833 he acquired (I prefer to use the term "acquired" rather than the word "purchased") the estates of Glengabers and Craka. He appears to have taken to those estates mainly in settlement of a claim for some fortune or money of his wife secured upon them. It is apparent, however, that he had at no time any intention of residing upon Glengabers, and, in fact, the acquisition of those estates bears but little, in my opinion, upon the question of domicile, because in 1833, when he acquired them, his

domicile, beyond all doubt, was, and for some years afterwards continued to be, in Jamaica.

He wrote occasionally at that time from Jamaica, evincing a desire to buy an estate at some future period in Scotland, if he could obtain one to his liking, and even an intention, if he could obtain such an estate, of living in Scotland, but nothing definite appears to have been arranged or said upon the subject; and, in fact, at this time other suggestions as to other localities appear to have been occasionally entertained and considered by him.

In these letters he frequently uses an expression that was much insisted upon at the bar — the expression of “coming home;” but I think it will be your Lordships’ opinion that the argument is not much advanced, one way or the other, by that expression. It appears to me to be obviously a form of language that would naturally be used by a colonist in Jamaica speaking of the mother country in contradistinction to the colony.

Up to this point, my Lords, there is really no dispute with regard to the facts of the case. The birth-domicile of the appellant in Jamaica continued, at all events till 1837, and the onus lies upon those who desire to show that there was a change in this domicile, by which I mean the personal status indicated by that word, — the onus, I say, lies upon those who assert that the personal status thus acquired, and continued from the time of his birth, was changed, to prove that that change took place. The law is, beyond all doubt, clear with regard to the domicile of birth, that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired.

I do not think it will be necessary to examine the various definitions which have been given of the term “domicile.” The question which I will ask your Lordships to consider in the present case is, in substance, this: Whether the appellant, before the 28th of September, 1838, the day of the death of his wife, had determined to make, and had made, Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country? The onus, as I have said, is upon the respondents to establish this proposition.

I will ask your Lordships, in the first place, to look at the facts subsequent to the return of the appellant to Scotland, as to which there is no dispute, then at the character of the parol evidence which has been adduced, and, finally, at a few passages in the correspondence which is in evidence.

As regards the facts which are admitted, they amount to this: The appellant lived under the roof of Mrs. Hosack from the time of his arrival in Edinburgh, in the year 1837, until the 1st of June, 1838. He appears to have borne the whole, or the greater part of her house-keeping expenses during that time. He inquired for, and

looked after, various estates, in the south of Scotland especially, and he indicated a preference for the estates of Blairston or Auchindraine, of Mollance, and of Enterkine. With regard to Blairston or Auchindraine, it does not appear, so far as I can discover, to have been actually offered to him for sale. With regard to Mollance, before he came to any determination as to it, it was sold to another person. With regard to Enterkine, at the time we are speaking of, the 1st of June, 1838, a negotiation had been going on by letters written between the appellant and those who were proposing to sell the estate, but the offer which he ultimately made for it had at that time been refused, and, on the 1st of June, 1838, there was no pending offer on his part for the property. Mrs. Bell, his wife, at this time was expecting her confinement. The house of his mother-in-law, in which they were sojourning, was not sufficiently commodious for their wants, and the appellant took for one year a furnished house in Ayrshire, called Trochraigue. He took it with no intention, apparently, of buying the estate, although it appears to have been for sale, but with the intention of living for a year in the house, and he hired servants for his accommodation. He removed to Trochraigue on the 1st of June, 1838, and, while so sojourning there, Mrs. Bell died in her confinement on the 28th of September in that year.

It appears to me, beyond all doubt, that prior to this time the appellant had evinced a great and preponderating preference for Scotland as a place of residence. He felt and expressed a great desire to find an estate there with a residence upon it, with which he would be satisfied. His wife appears to have been even more anxious for this than he himself was; and her mother and their friends appear to have been eager for the appellant to settle in Scotland. There is no doubt that, since the death of his wife, he actually has bought the estate which I have mentioned, the estate of Enterkine, and that his domicile is now in Scotland. All that, in my opinion, would not be enough to effect the acquisition of a Scotch domicile. There was, indeed, a strong probability up to the time of the death of his wife that he would ultimately find in Scotland an estate to his liking, and that he would settle there. But it appears to me to be equally clear that if, in the course of his searches, a property more attractive or more eligible as an investment had been offered to him across the Border, he might, without any alteration or change in the intention which he expressed or entertained, have acquired and purchased such estate and settled upon it, and thus have acquired an English domicile. In point of fact, he made more or less of general inquiry after estates in England; and a circumstance is told us by one of the witnesses, Mr. Telfer, which seems to me of great significance. Mr. Telfer says that his relations entertained great apprehension or dread that he would settle in England — a state of feeling on their part totally inconsistent with the notion

that he had, to their knowledge, at that time determined ultimately and finally to settle in Scotland.

These being the admitted facts, let me next turn to the character of the parol evidence in the case. As to the evidence of the members of the Hosack family, and of the servants, very little is to be extracted from it in the shape of information upon which we can rely. They speak of what they considered and believed was the intention of the appellant; but as to anything he said or did, to which alone your Lordships could attend, they tell us nothing beyond what we have from the letters. As to the evidence of the appellant himself, I am disposed to agree very much with what was said at the bar, that it is to be accepted with very considerable reserve. An appellant has naturally, on an issue like the present, a very strong bias calculated to influence his mind, and he is, moreover, speaking of what was his intention some twenty-five years ago. I am bound, however, to say, and therein I concur with what was said by the Court of Session, that the evidence of the appellant appears to be fair and candid, and that certainly nothing is to be extracted from it which is favorable to the respondents as regards the onus of proof which they have to discharge.

I will now ask your Lordships to look at what to my mind appears the most satisfactory part of the case, namely, the correspondence contemporaneous with the events in the years 1837 and 1838. I do not propose to go through it at length, but I will ask you to consider simply certain principal epochs in the correspondence from which, as it appears to me, we derive considerable light as to the intentions of the appellant.

In the first place, I turn to a letter written by the appellant on the 26th of September, 1837, three months after the appellant and his wife had come to Scotland. He is writing from Minto Street, Edinburgh, to his brother-in-law, Mr. William Hosack, in Jamaica, and he says: "I have not got rid of my complaint as yet, and still find difficulty in walking much, and was obliged to forego the pleasures of shooting, on which I had so much set my heart. This country is far too cold for a person not having the right use of his limbs. In fact I have been little taken with anything, and would go to Canada, Jamaica, or Australia, without hesitation. I enjoy the fresh butter and gooseberries." Of the latter — that is, of the gooseberries — he proceeds to state some evil consequences which he had suffered, and then he says: "Everything else is as good, or has an equivalent fully as good, in Jamaica. My mind is not made up as to the purchase of an estate. Land bears too high a value in proportion to other things in this country, owing to the members of the House of Commons and of Lords being all landowners, and having thereby received greater legislative protection. The reform voters begin to see this, and as soon as the character of the House of Commons changes enough (and it is changing prodigiously) the value of land

will come to its true value in the State. I have formed these views since I came home, and have lost in proportion my land-buying mania." Thus, having, as I have stated, a domicile by birth in Jamaica, and having come to this country with an indeterminate view as to what property he should become the purchaser of, writing three months afterwards, he says: "I have been little taken with anything, and would go to Canada, Jamaica, or Australia, without hesitation." Nothing can be more significant as to the absence of any determination in his mind to make Scotland his fixed home, and to spend the remainder of his days there.

I come to the 27th of December, 1837, when the appellant, again writing to the same brother-in-law in Jamaica, says: "As to the country, I like none of it. I have not purchased an estate, and not likely to do so. I had my guns repaired, bought a pointer, purchased the shooting of an estate for £10, have never been there, nor fired a shot anywhere else. Have had a fishing rod in my hands only for two hours, and caught nothing. I bought a horse, and might as well have bought a bear. He bites so, it would have been as easy to handle the one as the other. I exchanged him for a mare, and, positively, I have sent her to enjoy herself in a farm straw yard, without ever having been once on her back, or even touched her in any way." Here, again, we find that so far from his expressing a liking for the country upon better acquaintance, he says he does not like it, and so far from a determination to purchase an estate in Scotland and end his days upon it, he says, "I have not purchased an estate, and am not likely to do so."

Passing over three months more, I come to a letter dated the 20th of March, 1838, by Mrs. Bell, the wife's expressions being even more significant than those of her husband; for it is obvious that she, of the two, was more inclined to settle in Scotland. She writes: "The extreme severity of the winter has put us a good deal out of conceit of Scotland, but independent of that, I don't find the satisfaction in it I anticipated. If circumstances permitted, I would not mind to return to Jamaica, though, I dare say, after being here a few years I might not like it. This country is so gloomy, it is sadly depressing to the spirits, so unlike what one has been used to in dear, lovely Jamaica. The vile pride and reserve of the people is here too great a source of annoyance. A man is not so much valued on the manners and education of a gentleman as on the rank of his great grandfather — that is to say, among a certain class. You will perceive from this we are still at Number 9. Bell has several properties in view, but is as undetermined about where we may settle as when he left Jamaica. Next week he goes to Ayrshire to look at an estate, and from thence to Galloway and Dumfriesshire. If we don't fix very soon we purpose taking a furnished house in the country for twelve months." Now, the whole of this passage, I think, is of considerable importance, but the last sentence I have read affords a key



which may be useful in letting us into the design of the spouses in taking the furnished house of Trochraigue. The interpretation given by this letter is, that it was equivalent to saying that they had not at that time fixed upon a residence.

I pass on for two months more. The offer which in the interval he had made for Enterkine had been refused. The furnished house at Trochraigue had been taken. The appellant and his wife were upon the eve of taking possession of it on the 1st of June, 1838; and on the 28th of May, 1838, the appellant writes to his brother-in-law in Jamaica: "I have taken a country house at Trochrigg." "I leave this for it on the 1st of June. It is situated two miles from Girvan, which is twenty miles west of Ayr, on the seacoast. Therefore for the next twelve months you can address to me Trochrigg, near Girvan, Ayrshire, Scotland. The offer which I wrote you I have made for Enterkine I received no answer to until sixteen days after, and then I got an answer stating they had a better offer. Of this I believe as much as I like, for I see it advertised again in the Saturday's paper. I do not know whether I shall make anything of this estate for the present, and I care not. It is still very cold, and if I do not make a purchase in the course of this year, I perhaps will take a trip next summer to the south of France, and see whether I don't find it warmer there." That is to say in the next summer, which would be the summer of 1839, he was in expectation that Mrs. Bell and his family would be able to accompany him to "take a trip to the south of France, and see whether he did not find it warmer there," not, as it seems to me, for the purpose of enjoying a temporary sojourn, but, if he found it a more agreeable climate, for the purpose of making it his permanent residence.

There is only one other passage to which I would ask your Lordships' attention. It is in a letter written one month afterwards, while Mr. and Mrs. Bell were at Trochrigg, on the 16th of June. Writing to Mr. William Hosack, the appellant says: "There are several gentlemen's seats in the neighborhood, but none of them reside in them. We will probably have only three or four acquaintances, and shall be, in that respect, much the same as in Jamaica. We must, however, make the most of it for twelve months, in the hope that during that time I may be able to find some estate that will be suitable for me as a purchase."

I find nothing after this material in the correspondence before the death of Mrs. Bell, and the last sentence I have read appears to me to sum up and to describe most accurately the position in which the appellant was at Trochrigg; he was there in the hope that, during the "twelve months," he might be able to find some estate which might be suitable to him for purchase; but upon that contingency, as it seems to me, depended the ultimate choice which he would make of Scotland, or some other country, as a place of residence. If his hope should be realized, we might from this letter easily infer

that Scotland would become his home. If his hope should not be realized, I see nothing which would lead me to think, but everything which would lead me to doubt, that he would have elected to remain in Scotland as his place of residence.

It appears to me, on the whole, upon consideration of the facts which are admitted in the case, and the parol evidence, and the correspondence to which I have referred, that so far from the respondents having discharged the onus which lies upon them to prove the adoption of a Scotch domicile, they have entirely failed in discharging that burden of proof, and that the evidence leads quite in the opposite direction. There is nothing in it to show that the appellant's personal status of domicile as a native and an inhabitant of Jamaica has been changed on coming here by that which alone could change it, his assumption of domicile in another country. I am, therefore, unfortunately unable to advise you to concur in the opinion of the Court of Session. The Lord Ordinary entertained the opinion that the appellant, from the first moment of his arrival in Scotland, and of his sojourn at Mrs. Hesack's house, had acquired a Scotch domicile. But nothing could be more temporary — nothing more different from the state of things that would lead to the conclusion of the assumption of a Scotch domicile — than the circumstances under which that sojourn took place. Lord Cowan, in delivering the opinion of the Court of Session, appears, on the other hand, to have thought that the Scotch domicile was not acquired at the time of arrival in Scotland, but was acquired at the time of taking possession of Trochrigg. But if we are to put upon the occupation of Trochrigg the interpretation which the appellant himself put upon it at the time, so far from its being an assumption of a Scotch domicile, it appears to me to have borne an entirely different construction, and to have been a temporary place of sojourn, in order that a determination might be arrived at in the course of the sojourn as to whether a Scotch domicile should or should not ultimately be acquired.

There is one passage in the judgment of the Court of Session, delivered by Lord Cowan, to which I must ask your Lordships more particularly to refer, for it appears to me to afford a key to what I think, with great respect, I must call the fallacious reasoning of the judgment. After speaking of the parol evidence given by the appellant, Lord Cowan uses these words: "For after all, what do the statements of the defender truly amount to? Simply this, that prior to September, 1838, he had not fixed on any place of permanent residence, and had not finally made up his mind or formed any fixed intention to settle in Scotland before he bought Enterkine. There is no statement that he had it in his mind to take up his residence elsewhere than in Scotland." If, my Lords, I read these words correctly, Lord Cowan appears to have intimated that in his opinion it would not be enough to find that the appellant had not fixed on any

place of permanent residence prior to September, 1838, and had not decidedly made up his mind or formed a fixed intention to settle in Scotland, unless proof were also adduced that he had it in his mind to take up his residence elsewhere than in Scotland. I venture to think that would be an entirely fallacious mode of reasoning, and would be entirely shifting the position of the proof which has to be brought forward. The question, as it seems to me, is not whether he had made up his mind to take up his residence elsewhere than in Scotland, but the question is, had he, prior to September, 1838, finally made up his mind or formed a fixed intention to settle in Scotland. Lord Cowan appears to admit that the parol evidence itself would show that that had not been done, and that parol evidence is, in my mind, fortified and made very much more emphatic by the evidence of the correspondence to which I have referred.

I have humbly, therefore, to advise your Lordships to assoilzie the defender from the conclusions of the summons, and to reverse the sixteen interlocutors which have been pronounced by the court below.

LORD WESTBURY. My Lords, I have very few words to add to what has been already stated to your Lordships; and, perhaps, even those are not quite necessary.

What appears to me to be the erroneous conclusion at which the Court of Session arrived is in great part due to the circumstance, frequently lost sight of, that the domicile of origin adheres until a new domicile is acquired. In the argument, and in the judgments, we find constantly the phrase used that he had abandoned his native domicile. That domicile appears to have been regarded as if it had been lost by the abandonment of his residence in Jamaica. Now, residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now this case was argued at the bar on the footing, that as soon as Mr. Bell left Jamaica he had a settled and fixed intention of taking up his residence in Scotland. And if, indeed, that had been ascertained as a fact, then you would have had the *animus* of the party clearly demonstrated, and the *factum*, which alone would remain to be proved, would in fact be proved, or, at least, would result immediately upon his arrival in Scotland.

The true inquiry, therefore, is, Had he this settled purpose, the moment he left Jamaica, or in course of the voyage, of taking up a

fixed and settled abode in Scotland? Undoubtedly, part of the evidence is the external act of the party; but the only external act we have here is the going down with his wife to Edinburgh, the most natural thing in the world, to visit his wife's relations. We find him residing in Scotland from that time; but with what *animus* or intention his residence continued there we have yet to ascertain. For although residence may be some small *prima facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation.

I take it that Mr. Bell may be more properly described by words which occur in the Digest; that when he left Jamaica he might be described as *quaerens, quo se conferat, atque ubi constituat domicilium*. Dig. lib. 50 t. 1, 27. Where he was to fix his habitation was to him at that time a thing perfectly unresolved; and, as appears from the letters which your Lordships have heard, that irresolution, that want of settled fixity of purpose, certainly continued down to the time when he actually became the purchaser of Enterkine. But the *punctum temporis* to which our inquiries are to be directed as to Mr. Bell's intention is of an earlier date than that. The question is, had he any settled fixed intention of being permanently resident in Scotland on the 28th of September, 1838? I quite agree with an observation which was made in the Court of Session, that the letters are the best evidence in the case. To those letters your Lordships' attention has been directed, and whether you refer to the language of the wife's letters, or look exclusively at the language of the husband's letters written to his familiar friends or his relatives whom he had left in Jamaica, it is impossible to predicate of him that he was a man who had a fixed and settled purpose to make Scotland his future place of residence, to set up his tabernacle there, to make it his future home. And unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that the domicile of origin continues. And therefore I think we can have no hesitation in answering the question where he was settled on the 28th of September. It must be answered in this way; he was resident in Scotland, but without the *animus manendi*, and therefore he still retained his domicile of origin.

My Lords, it is matter of deep regret, that although it might have been easily seen from the commencement of this cause that it turned entirely upon this particular question, yet we find that ten years of litigation have taken place, with enormous expense, and an enormous amount of attention to a variety of other matters, which would have been wholly unnecessary if judicial attention had been concentrated upon this question, which alone was sufficient for the decision of the case.<sup>1</sup>

<sup>1</sup> *Acc.* Ennis v. Smith, 14 How. 400; Mitchell v. U. S., 21 Wall. 350; Hartford v. Champion, 53 Conn. 268, 20 Atl. 471; Wilkins v. Marshall, 80 Ill. 74; Astley v.

## UDNY v. UDNY.

HOUSE OF LORDS. 1869.

[*Reported Law Reports, 1 House of Lords (Scotch), 441.*]

THE late Colonel John Robert Fullerton Udney, of Udney, in the county of Aberdeen, though born at Leghorn, where his father was consul, had by paternity his domicile in Scotland. At the age of fifteen, in the year 1794, he was sent to Edinburgh, where he remained for three years. In 1797 he became an officer in the Guards. In 1802 he succeeded to the family estate. In 1812 he married Miss Emily Fitzhugh, — retired from the army, — and took upon lease a house in London, where he resided for thirty-two years, paying occasional visits to Aberdeenshire.

In 1844, having got into pecuniary difficulties, he broke up his establishment in London and repaired to Boulogne, where he remained for nine years, occasionally, as before, visiting Scotland. In 1846 his wife died, leaving the only child of her marriage, a son, who, in 1859, died a bachelor.

Some time after the death of his wife Colonel Udney formed at Boulogne a connection with Miss Ann Allat, which resulted in the birth at Camberwell, in Surrey, on the 9th of May, 1853, of a son, the above respondent, whose parents were undoubtedly unmarried when he came into the world. They were, however, united afterwards in holy matrimony at Ormiston, in Scotland, on the 2d of January, 1854, and the question was whether the respondent, under the circumstances of the case, had become legitimate *per subsequens matrimonium*.

The Court of Session (First Division) on the 14th of December, 1866, 3d Series, vol. v. p. 164, decided that Colonel Udney's domicile of origin was Scotch, and that he had never altered or lost it, notwithstanding his long absences from Scotland. They therefore found that his son, the respondent, "though illegitimate at his birth, was legitimated by the subsequent marriage of his parents." Hence this appeal, which the House regarded as involving questions of greatly more than ordinary importance.

LORD WESTBURY.<sup>1</sup> The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct

Capron, 89 Ind. 167; *Otis v. Boston*, 12 Cush. 44; *DeMeli v. DeMeli*, 120 N. Y. 485. 24 N. E. 996; *Guier v. O'Daniel*, 1 Bin. 349 n.; *Pilson v. Bushong*, 29 Grat. 229; *Kellogg v. Winnebago County*, 42 Wis. 97.

Conversely, the mere intent to acquire a new domicile without physical presence at the new place will not change the domicile. *Goods of Raffeneil*, 3 Sw. & Tr. 49; *In re Marrett*, 36 Ch. Div. 400; *Talmadge v. Talmadge*, 66 Ala. 199; *Carter v. Sommermeyer*, 27 Wis. 665; *de Champagny's Appeal* (French Cassation), *Dalloz*, 1875, i. 384; *Martini v. Schliewinski*, (Germany, *Oberhandelsgericht*), 13 *Entsch.* 363. — Ed.

<sup>1</sup> Concurring opinions of the LORD CHANCELLOR, LORD CHELMSFORD, and LORD COLONSAY are omitted. — Ed.

legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the time of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate. This has been called the domicile of origin, and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicile of choice.

Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited

period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi*, can be inferred the fact of domicile is established.

The domicile of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party.

Domicile of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicile remains until another is acquired. This is true if applied to the domicile of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicile of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicile has *animo et facto* been acquired. The cases to which I have referred are, in my opinion, met and controlled by other decisions. A natural-born Englishman may, if he domiciles himself in Holland, acquire and have the *status civilis* of a Dutchman, which is of course ascribed to him in respect of his settled abode in the land, but if he breaks up his establishment, sells his house and furniture, discharges his servants, and quits Holland, declaring that he will never return to it again, and taking with him his wife and children, for the purpose of travelling in France or Italy in search of another place of residence, is it meant to be said that he carries his Dutch domicile, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity and, on the contrary, much reason, in holding that an acquired domicile may be effectually abandoned by unequivocal intention and act; and that when it is so determined the domicile of origin revives until a new domicile of choice be acquired. According to the *dicta* in the books and cases referred to, if the Englishman whose case we have been supposing lived for twenty years after he had finally quitted Holland, without acquiring a new domicile, and afterwards died intestate, his personal estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition supposed to be authorized by one or more decisions involves absurd results, there is great reason for believing that no such rule was intended to be laid down.

In Mr. Justice Story's *Conflict of Laws* (the last edition) it is stated that "the moment the foreign domicile (that is, the domicile of choice) is abandoned, the native domicile or domicile of origin is re-acquired."

And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicile.

In adverting to Mr. Justice Story's work, I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed, "The result of the more recent English cases seems to be, that for a change of national domicile there must be a definite and effectual change of nationality." In support of this proposition the editor refers to some words which appear to have fallen from a noble and learned lord in addressing this House in the case of *Moorhouse v. Lord*, 10 H. L. C. 272, when in speaking of the acquisition of a French domicile, Lord Kingsdown says, "A man must intend to become a Frenchman instead of an Englishman."

These words are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality, that is, of natural allegiance.

That would be to confound the political and civil states of an individual, and to destroy the difference between *patria* and *domicilium*.

The application of these general rules to the circumstances of the present case is very simple. I concur with my noble and learned friend that the father of Colonel Udney, the consul at Leghorn, and afterwards at Venice, and again at Leghorn, did not by his residence there in that capacity lose his Scotch domicile. Colonel Udney was, therefore, a Scotchman by birth. But I am certainly inclined to think that when Colonel Udney married, and (to use the ordinary phrase) settled in life and took a long lease of a house in Grosvenor Street, and made that a place of abode of himself and his wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality; and when he had remained there for a period, I think, of thirty-two years, there being no obstacle in point of fortune, occupation, or duty, to his going to reside in his native country; under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udney deliberately chose and acquired an English domicile. But if he did so, he as certainly relinquished that English domicile in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving London in a manner which removes all doubt of his ever intending to return there for the purpose of residence. If, therefore, he acquired an English domicile he abandoned it absolutely *animo et facto*. Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to Boulogne, and at the same time his domicile of origin revived. The rest is plain. The marriage and the consequences of that marriage must be determined by the law of Scotland, the country of his domicile.<sup>1</sup>

<sup>1</sup> *Acc.* Reed's Appeal, 71 Pa. 378 (*semble*); *Allen v. Thomason*, 11 Humph. 536. *Contra*, *Munroe v. Douglas*, 5 Madd. 379; *First Nat. Bank v. Balcom*, 35 Conn. 351; *Succession of Steers*, 47 La. Ann. 1551, 18 So. 503; *Harvard College v. Gore*, 5 Pick 370 (*semble*). — ED.



## IN RE TOOTAL'S TRUSTS.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1883.

*[Reported 23 Chancery Division, 532.]*

CHITTY, J. The question raised by this petition is whether the personal estate of the testator, J. B. Tootal, is liable to legacy duty. The testator's will was proved in Her Majesty's Supreme Court for China and Japan at Shanghai, and has not been proved in England. No part of his personal estate was locally situate in England at the time of his death, and it is admitted on the part of the Crown that probate in England is not required. In consequence of the claim made by the Crown for legacy duty the executors, who are also trustees of the will, have paid the funds representing the residuary personal estate into court under the Trustee Relief Act. And the petition is presented by some of the residuary legatees, or persons claiming under them, asking for a declaration that the testator was domiciled at Shanghai at the time of his death, and consequently that no legacy duty is payable, and for a distribution of the fund on that footing.

The liability of the personal estate of a testator or intestate to legacy duty under the statutes in question depends on his domicile at his death; if his domicile is in Great Britain the duty is payable, if his domicile is out of Great Britain no duty is payable. That his personal estate may happen to be locally situate in Great Britain, or that the funds may be transmitted to Great Britain for the purpose of being paid to the legatees, are immaterial circumstances. The broad principle that the liability depends on domicile was established by the House of Lords in *Thomson v. Advocate-General*, 12 Cl. & F. 1. The earlier decisions in conflict with that principle were overruled by that case. The previous decision of the House of Lords in *Attorney-General v. Forbes*, 2 Cl. & F. 43, does not, when explained, conflict with *Thomson v. Advocate-General*. As was pointed out by Lord Wensleydale in *Attorney-General v. Napier*, 6 Ex. 217, the case of *Attorney-General v. Forbes* proceeded upon the assumption (which so far as the facts are stated in the reports was erroneous) that the domicile was in India, and it must be treated as a case of domicile in India. The first and principal question then is where the testator was domiciled at the time of his death.

It is admitted that his domicile of origin was in England. The burden of proof that he had acquired a new domicile of choice therefore rests on the petitioners.

The facts are not in dispute. After some previous changes of residence, which it is unnecessary to trace, the testator in 1862 went to reside at Shanghai in the Empire of China, and, with the exception of some visits to England in 1864 and 1873 for health and business, he continued to reside at Shanghai till his death, which occurred in 1878.

During his residence there he very extensively engaged in business in connection with newspapers, being the manager and part proprietor of the "North China Herald" and the "North China Daily News" and other publications and periodicals, all of which were published at Shanghai, and he was also a partner in a printing business there.

Evidence has been adduced on the part of the petitioners showing that for some years before his death he had determined to reside permanently at Shanghai, and had relinquished all intention of ever returning to England, and that he had in fact on several occasions expressed his intention of not returning to England. This evidence remains uncontradicted on the part of the Crown. In his will he describes himself as of Shanghai in the Empire of China. In these circumstances it was admitted by the petitioners' counsel that they could not contend that the testator's domicile was Chinese. This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in *The Indian Chief*, 3 Rob. Adm. 29, and by Dr. Lushington in *Maltass v. Maltass*, 1 Rob. Ecc. 67, 80, 81.

But it is contended on the part of the petitioners that the testator's domicile was what their counsel termed "Anglo-Chinese," a term ingeniously invented in analogy to the term "Anglo-Indian."

To make this contention intelligible it is necessary to state some further facts. Under the treaties between Her Majesty and the Emperor of China of 1842, 1843, and 1858, British subjects with their families and their establishments are allowed to reside for the purpose of carrying on their mercantile pursuits without molestation at Shanghai and certain other cities, and to establish warehouses, churches, hospitals, and burial grounds. By the 15th clause of the treaty of 1858 it is stipulated that all questions in regard to rights of property or person arising between British subjects shall be subject to the jurisdiction of the British authorities. By the same treaty provision is made for the settlement of disputes between British subjects and Chinese by the joint action of the British consul and the Chinese authorities, and also for the Chinese authorities themselves affording protection to the persons and properties of British subjects.

The treaties do not contain any cession of territory so far as relates to Shanghai, and the effect of them is to confer in favor of British subjects special exemptions from the ordinary territorial jurisdiction of the Emperor of China, and to permit them to enjoy their own laws at the specified places. Similar treaties exist in favor of other European governments and the United States.

By virtue of these treaties and of the statutes 6 & 7 Vict. c. 80 and c. 94, the Crown has, by the Order in Council of the 9th of March, 1865, constituted a Supreme Court at Shanghai.

The first of these statutes, intituled "An Act for the better gov-

ernment of Her Majesty's subjects resorting to China," enables Her Majesty by order in council to ordain "for the government of her subjects within the dominion of the Emperor of China, or being within any ship or vessel at a distance of not more than one hundred miles from the coast of China," any law or ordinance as effectually as any such law or ordinance could be made by Her Majesty in council for the government of her subjects within Hong Kong which had been ceded to Her Majesty. The second of the statutes, commonly known as the Foreign Jurisdiction Act, after reciting that by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty had power and jurisdiction within divers countries and places out of her dominions, and that doubts had arisen how far the exercise of such powers and jurisdiction was controlled by and dependent on the laws and customs of the realm, enacts that Her Majesty may exercise any power or jurisdiction which she then had, or at any time thereafter might have, within any country or place out of her dominions in as ample a manner as if she had acquired such power or jurisdiction by the cession or conquest of territory. The order in council by which the Supreme Court was established, provides that all Her Majesty's jurisdiction exercisable in China for the judicial hearing and determination of matters in difference between British subjects or between foreigners and British subjects, or for the administration or control of the property or persons of British subjects, shall be exercised under or according to the provisions of the order and not otherwise. It further provides that subject to the provisions of the order the civil jurisdiction shall, as far as circumstances admit, be exercised upon the principles of and in conformity with the common law, the rules of equity, the statute law, and other law for the time being in force in and for England. The Supreme Court is a court of law and equity, and a court for matrimonial causes, but without jurisdiction as to dissolution or nullity or jactitation of marriage. It is a court of probate, and as such "as far as circumstances admit" has for and within China, with respect to the property of British subjects having at the time of death "their fixed places of abode in China," all such jurisdiction as for the time being belongs to the Court of Probate in England. It has jurisdiction for the safe custody of the property of British subjects not having at the time of death their fixed abode in China or Japan.

The exceptions from the jurisdiction of the court as a matrimonial court in regard to dissolution, nullity, or jactitation of marriage are important, and the effect of them is apparently to leave English men subject to the jurisdiction of the court for matrimonial causes in England in respect of the excepted matters.

Upon these facts it is contended for the petitioners that there exists at the foreign port of Shanghai an organized community of British subjects independent of Chinese law and exempt from Chinese jurisdiction, and not amenable to the ordinary tribunals of this coun-

try, but bound together by law which is English law, no doubt, but English law with this difference, that the English revenue laws do not form part of it, and that by residence and choice the testator became a member of this community, and as such acquired an Anglo-Chinese domicile.

The authorities cited in support of this contention for an Anglo-Chinese domicile relate to the Anglo-Indian domicile of persons in the covenanted service of the East India Company. These authorities are generally admitted to be anomalous. Dicey on Domicile, pp. 140, 141, 337. They are explained by Lord Hatherley in his judgment in *Forbes v. Forbes*, Kay, 341, and by Lord Justice Turner in *Jopp v. Wood*, 4 D. J. & S. 616. The point that the *animus manendi* was inferred in law from the obligation to serve in India as stated by Lord Hatherley, has no bearing on the case before me, in which the evidence is sufficient for general purposes to establish the *animus manendi*. But the observations of Lord Justice Turner that the East India Company was regarded as a foreign government are material. He says, *Ibid.* 623: "At the time when those cases [on Anglo-Indian domicile] were decided, the government of the East Indian Company was in a great degree, if not wholly, a separate and independent government foreign to the government of this country, and it may well have been thought that persons who had contracted obligations with such government for service abroad could not reasonably be considered to have intended to retain their domicile here. They, in fact, became as much estranged from this country as if they had become servants of a foreign government."

Lord Stowell in his judgment in the *Indian Chief* shows that in his time the sovereignty of the Great Mogul over the British territories in India was merely nominal, being, as he says, occasionally brought forward for purposes of policy, and that the actual authority of government over these territories was exercised with full effect by this country, and the East India Company, a creature of this country. His observation as to the authority of government being exercised by this country is not really inconsistent with the passage above cited from Lord Justice Turner's judgment. Lord Stowell was not addressing himself to the particular point for which I have quoted Lord Justice Turner's judgment. Although the government of British India was English, being carried on principally by the agency of the chartered company, it was for all practical purposes a distinct government from that of Great Britain, and in that sense it was, as Lord Justice Turner says, regarded as a foreign government. At Shanghai there is a British consul, residing there by virtue of the treaties, but there is no government by British authority existing there, and there is nothing which can be regarded as a separate or independent government, and the analogy which the petitioners seek to establish with an Anglo-Indian domicile is not made out.

On principle, then, can an Anglo-Chinese domicile be established? The British community at Shanghai, such as it is, resides on foreign

territory; it is not a British colony, nor even a Crown colony, although by the statutes above referred to the Crown has as between itself and its own subjects there a jurisdiction similar to that exercised in conquered or ceded territory.

Residence in a territory or country is an essential part of the legal idea of domicile. Domicile of choice, says Lord Westbury in *Udny v. Udny*, Law Rep. 1 H. L., Sc. 458, is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. He speaks of residence in a particular place, and not of a man attaching himself to a particular community resident in the place. In *Bell v. Kennedy*, Law Rep. 1 H. L., Sc. 320, he uses similar expressions. Domicile is an idea of the law; "it is the relation which the law creates between an individual and a particular locality or country." He refers to locality or country and not to a particular society subsisting in the locality or country. The difference of law, religion, habits, and customs of the governing community may, as I have already pointed out, be such as to raise a strong presumption against the individual becoming domiciled in a particular country; but there is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign territorial power. There may be, and indeed are, numerous examples of particular sects or communities residing within a territory governed by particular laws applicable to them specially. British India affords a familiar illustration of this proposition. But the special laws applicable to sects or communities are not laws of their own enactment, they are merely parts of the law of the governing community or supreme power.

It may well be that a Hindoo or Mussulman settling in British India, and attaching himself to his own religious sect there, would acquire an Anglo-Indian domicile, and by virtue of such domicile would enjoy the civil status as to marriage, inheritance, and the like accorded by the laws of British India to Hindoos or Mussulmans, and such civil status would differ materially from that of a European settling there and attaching himself to the British community. But the civil status of the Hindoo, the Mussulman, and the European would in each case be regulated by the law of the supreme territorial power.

In the case before me the contention is for a domicile which may not improperly be termed extraterritorial. The sovereignty over the soil at Shanghai remains vested in the Emperor of China with this exception, that he has by treaty bound himself to permit British subjects to reside at the place for the purposes of commerce only, without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects, but over no other persons.

According to the petitioner's argument the subjects or citizens of all the foreign states who enjoy similar treaty privileges would (subject to any particular exceptions arising from the law of their own country in

relation to domicile), acquire under circumstances similar to those in the present case a new domicile of choice. If, for instance, a citizen of the United States were to reside at Shanghai with the intention of remaining there permanently, but not under such circumstances as would be sufficient to rebut the strong presumption against a Chinese domicile, and were to attach himself so far as he could to one of the European communities there, say, for an instance, the British community, he would, according to the petitioner's contention, have lost his domicile of origin, and would have acquired an Anglo-Chinese domicile, which for most practical purposes would be equivalent to an English domicile. In my opinion he would not acquire such a domicile.

It appears to me that there is no substantial difference as to the question I am considering between the residence of a British subject at Shanghai, or at any factory in Turkey or elsewhere, or the East, whether by virtue of special treaties, capitulations, sufferance, or the like. But such factories are not regarded as colonies or foreign countries for the purpose of domicile. There may be commercial domicile there in times of war with reference to the law of capture, but that is altogether a different matter.

No authority except those relating to Anglo-Indian domicile has been cited in support of the petitioner's contention as to domicile. In *Maltass v. Maltass*, 1 Rob. Ecc. 80, already cited, Dr. Lushington admitted to probate the will, valid according to the law of England, of an English merchant resident at a British factory at Smyrna. He held that if the treaty between England and the Porte was applicable to British merchants resident or domiciled in the ordinary acceptation of the term in Smyrna, the provisions of the treaty decided what was to be done in the case of succession to personal estate, namely, that it was to follow the law of England. But he considered that the deceased was domiciled not in a colony, but in England.

In the argument for the petitioners great reliance was placed on the nature and extent of the jurisdiction of the court at Shanghai, and the fact that the will has not been proved in England. The law administered by the court at Shanghai, being for most practical purposes the same as that administered in England, the question of domicile is likely to arise only in exceptional cases like the present. The jurisdiction conferred on the Supreme Court at Shanghai is merely the jurisdiction of Her Majesty exercisable in China, and confined to British subjects. It is not exclusive and does not oust the jurisdiction of Her Majesty's courts in England. No solid reason exists that I can discover for holding that the will of an Englishman "whose fixed place of abode" was at his death in China, could not be admitted to probate by the Court of Probate in England. I may observe that the term "fixed place of abode" is not equivalent to domicile. The technical term "domicile" was, it appears to me, purposely avoided. The only distinction between this case and *Maltass v. Maltass*, 1 Rob. Ecc. 67, is the existence at Shanghai of an English Court of Probate. Similar

courts now exist in the Ottoman dominions and in Egypt. In fact all these courts are consular courts, or constituted on the same model with more or less jurisdiction.

In the case of *Attorney-General v. Napier*, 6 Ex. 217, letters of administration had been granted by the courts established in India, where nearly the whole of the intestate's personal estate was locally situate at his death. In order to recover a comparatively small debt in England, administration was taken out in this country also. The intestate's domicile was in England. But in deciding that legacy duty was payable, the Court of Exchequer proceeded solely on the domicile, and did not even advert in the judgment to the grant of administration in England. Evidently that fact, as well as the fact that the Indian court had jurisdiction to grant and had granted administration, were considered immaterial.

If an Englishman domiciled in England dies resident abroad, and no part of his assets are in England, and no probate or letters of administration are taken out in England, there may be great difficulty in asserting the Crown's right to duty, and inasmuch as foreign courts will not enforce the revenue laws of this country the difficulty may in some cases be insuperable. But the Crown's right cannot depend on the greater or less difficulty in pursuing the remedy. In the case before me there is no difficulty in giving the remedy, since the fund is in court, and under the Legacy Duty Acts this court or its officers are bound to see that the legacy duty, if payable, is paid before the fund is parted with.

The circumstance that the will has not been proved here is also immaterial. It has been proved in a duly constituted British court of competent jurisdiction, and, it being admitted that further probate here is not required, it follows that the court must look at the Shanghai probate before distributing the fund. This disposes of the argument that the court cannot take notice of an alleged will of personal estate, unless it has been proved in this country. The argument which was addressed to me, founded on a close examination of the various provisions of the Legacy Duty Acts, for the purpose of showing that they do not apply in the circumstances of this case, was substantially the same as that urged in the House of Lords in *Attorney-General v. Forbes*, 2 Cl. & F. 48, and is disposed of by the decisions in *Thomson v. Advocate-General*, 12 Cl. & F. 1, and in *Attorney-General v. Forbes*, as explained by the Court of Exchequer in *Attorney-General v. Napier*, 6 Ex. 217.

For these reasons I hold that there is no such thing known to the law as an Anglo-Chinese domicile, that the testator's domicile remained English, and that the circumstances are not sufficient to create any exception from the broad principle that legacy duty is payable when the domicile is British. Consequently I think that the duty is payable <sup>1</sup>

<sup>1</sup> Approved, *Abd-ul-Messih v. Farra*, 13 App. Cas. 431 (1888). The residence relied upon to establish domicile in that case was at Cairo, as a protected British sub-

## IN RE CRAIGNISH.

HIGH COURT OF JUSTICE: COURT OF APPEAL. 1892.

[Reported [1892] 3 *Chancery*, 180.]

CHITTY, J.<sup>1</sup> The plaintiff claims to be entitled beneficially to one-half of the property which passed under the will of his late wife. . . . He bases his claim on two grounds, — first, he alleges that during the marriage his own domicile, and consequently his wife's domicile, was Scotch; and, secondly, that according to the law of Scotland he is entitled beneficially to one-half of the £20,000 which she appointed, and one-half of her residuary estate. . . . In order to establish that his own domicile was Scotch, the plaintiff gave evidence as to the domicile of his great-grandfather and his grandfather. When this evidence, chiefly documentary, had been put in, it was admitted by the defendants' counsel that the plaintiff had proved that the domicile of both these ancestors was and continued until their deaths to be Scotch; consequently, the plaintiff's father, being the legitimate son of a man domiciled in Scotland, had at his birth a Scotch domicile. The contest then starts from this point. In the course of it many questions were raised, some of law, and some of fact, including the just inferences to be drawn from the facts proved. In view of the conclusion at which I have arrived on the facts subsequent to the plaintiff's marriage with Miss Meeking, I shall pass by many of the questions that were raised; I shall begin with a short statement of the facts from the plaintiff's birth down to that marriage. He was born on the 24th of December, 1836, at Sydney, in New South Wales. His father was then an officer in the 21st Regiment, serving with his regiment stationed there. His father and mother had married in that colony in 1834. His mother was the daughter of Sir Alexander Macleay, Speaker to the Legislative Council at Sydney. On the 15th of December, 1837, the plaintiff's father retired from the army by sale of his commission. He remained in the colony for some few years afterwards. He became police magistrate at Parramatta, and subsequently, about 1838 or 1839, Colonial Treasurer. He gave up his appointment and left the colony about 1841. In that year he arrived in England with his wife and family, including the plaintiff. He subsequently visited Scotland, and, after a short stay in Manchester, he came with his wife and family to London in 1846, and continued to reside there until his death. In August, 1846, he was appointed secretary to the London and South-Western Railway Company. The salary was considerable and sufficient for the support of his family and himself. He became a member of the Junior United Service Club. In February,

ject. The Court said: "Residence in a foreign state, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicile acquired elsewhere, is ineffectual to create a new domicile of choice." — ED.

<sup>1</sup> The opinion only is given: it sufficiently states the case. Only so much of the opinion as deals with the question of domicile is given. — ED.



1848, he purchased 62, Chester Square, for the remainder of a long lease, and went to reside there with his wife and family, and he continued to reside there with them until his death, which occurred on the 4th of October, 1848. Being in ill-health he had resigned his office of secretary in the previous September. He made his will on the 28th of that month, describing himself as of 62, Chester Square, in the county of Middlesex. The residue of his property remaining after payment of his debts amounted only to a few hundred pounds, which he bequeathed to his wife. He had lost his money by the failure of the Western Bank of Australia, as he learnt on his arrival in England in 1841.

Upon these facts it was argued for the defendants, — first, that the plaintiff's father was at the time of the plaintiff's birth domiciled in New South Wales, and consequently that the plaintiff's domicile of birth was in that country; and, secondly, that if the plaintiff's father was not then domiciled in New South Wales, he was domiciled in England at the time of his death, and thereupon it was argued for the defendants, as a proposition of law, that domicile of origin, rightly understood, does not mean domicile at birth; but the last domicile imposed by the choice of the father, or other the guardian of an infant, who has authority to change the domicile of an infant by changing his own. This proposition of law was also raised in reference to certain facts (which I have not noticed) relating to the plaintiff's father while under age. It was urged that great inconvenience and hardship would arise by holding that domicile of origin meant simply domicile at birth, and a case was put by way of illustration. Suppose, it was said, that at the time of the birth of his child an Englishman is domiciled in France, that shortly afterwards, say within three months of the birth of the child, the father breaks up his home in France and returns to England, his own domicile of origin, and continues to live settled there until the child comes of age — it was urged that it would be a great hardship on this English child to hold that throughout the rest of his life there was clinging to him a French domicile ready to arise whenever he abandoned the English domicile, or any subsequent domicile acquired by his own choice. But this case can be met by a parallel counter-case. Suppose an Englishman domiciled in England at his child's birth retains his English domicile until say within three months of the child's coming of age, and then breaks up his English home and acquires a domicile in France, which he retains until the child comes of age — according to the argument for the defendants the domicile of origin of this English child would be French. But inasmuch as I intend to decide this case on the assumption that the plaintiff's domicile of origin was Scotch, I pass by these questions of fact and law without expressing any opinion upon them, except by saying, as to the defendants' proposition of law, that I am not persuaded that it is well founded, or that it can be supported upon a due examination of the authorities bearing on the subject.

The plaintiff was in his twelfth year at his father's death. He was educated for the military service, chiefly in England, but partly in Ger-

many, where his mother was residing. He obtained a military cadetship in the service of the East India Company, went out to India, and was appointed in 1854 to the 7th Bombay Native Infantry, one of the company's regiments. He remained in the company's service until the government of India was transferred to the Crown by the act passed in 1858. He then became a military officer under the Crown. In 1869 he finally left India, and in 1871 he retired from military service on a pension. From 1854 to 1869 he was constantly in active service. He served in the Persian and other wars, and in the Mutiny he was an officer in Jacob's Horse. On his quitting India finally in 1869, he abandoned the Anglo-Indian domicile which he had acquired; thereupon his domicile of origin, which I assume to be Scotch, revived, and this domicile continued unless and until he acquired a new domicile by choice. The burden of proving that he acquired a new domicile by choice is upon the defendants. From 1869 to 1883 his career may be briefly stated. During this period London seems to have been his headquarters. From London he generally started, and to London he generally returned on and after his numerous expeditions. He was continually moving from place to place. Down to 1877 his movements were principally in the direction where there was war or rumor of war. He was the military correspondent of a leading London newspaper — the "Standard" — during the Franco-German War; afterwards he was roving correspondent for that newspaper. He was called back to England by the "Standard," and acted as military correspondent for that paper at the manœuvres on Salisbury Plain in 1872. He was present in the Spanish War in 1873, as correspondent for an English newspaper called the "Hour," which had but a brief existence. I pass by the disturbances in Bosnia and Herzegovina in 1875, the Servian War in 1876, the Turkish War in 1877, and the siege of Batoum in the same year, in all of which he played some part, or had some concern. After 1877 his expeditions in connection with war appear to have ceased. In 1878 he was at Milan and Paris, and then he came to London; and thence he went on a visit to Scotland and Ireland. In May, 1879, he was divorced from his first wife at her suit by the decree of the High Court in London, made absolute in the following December. He had married her in 1862 while in India. In 1879 he was living on the banks of the river Thames, not far from London. In 1881 he travelled to Sydney, his birthplace, and returned to London about the end of that year. In 1882 he received from the Duke of Saxe-Coburg-Gotha the dignity of Baron von Craignish, and in 1883 he obtained the royal license to use that title in this country. It is said, however, that his claim to use the title is not recognized in Scotland. The selection of Craignish for his title has apparently given great offence to an elder branch of the Campbell family in Scotland. The estate of Craignish in Scotland has passed away from the Campbells. The plaintiff is not a Campbell of Craignish. His family is Campbell of Laggan Lochan. Neither the plaintiff nor his father ever held any land in Scotland. I have mentioned this circum-

stance as to the grant of the dignity by a foreign prince because the plaintiff's counsel placed some reliance on it; but it appears to me to have no bearing on the question of domicile.

I now come to the critical period which extends from his marriage with Miss Meeking until her death. The marriage took place at the British Embassy in Paris on the 26th of March, 1883. He was then in his forty-seventh year — a time of life when a man is less disposed to rove and more inclined to settle down, particularly when he has married a rich wife. He is described in the marriage certificate as “of the parish of Sydney, in the county of New South Wales, then residing at Parr's Hotel, Brighton,” and she is described as “of the parish of St. Andrew's, Holborn, in the county of Middlesex.” They seem to have started from London for the marriage in Paris. After the marriage they went on a trip to Nice, and from Nice they returned to London. There they stayed at Fisher's Hotel, Clifford Street. That was in the middle of 1883. He bought a yacht at Cowes, which his wife paid for and presented to him. The yacht was, and continued to be, stationed at Cowes. His property consisted of his pension and some articles of ornament or the like, which he had apparently collected in his wanderings. He had no other property except the yacht. During the yachting seasons of the years 1883, 1884, and 1885, the yacht was used by him, sometimes with and sometimes without his wife, for various trips to Scotland, the Mediterranean, and the Baltic. During the same period they made visits to the Riviera, Paris, and Boulogne, Germany, and the New Forest in England, generally, but not always, together. There was some little confusion in the plaintiff's evidence as to the dates and order of these trips and visits; but the exact dates and order are not material. During this period the plaintiff and his wife were frequently in London, staying at hotels and furnished rooms. Whatever expeditions they made, the plaintiff and his wife (as he stated in his evidence) always came back to London. On the 4th of January, 1886, the plaintiff signed an agreement for taking No. 25, Albert Gate, on a tenancy commencing on the 15th of that month. He entered into possession accordingly, and resided there with his wife until their separation, which took place in June or July following. The plaintiff, in his evidence, seemed desirous of ascribing the taking of this house solely to his wife; he had apparently forgotten that he had himself signed the agreement, and that in a letter written by him to her after the separation, dated Piccadilly, he had spoken of the house emphatically as “my house.” The taking of this house was his own act, even if he took it at the request of his wife. The house was taken with the furniture therein. His wife had furniture stored at a repository; some of this was removed to the house, but the bulk remained at the repository. The articles which belonged to him were removed to the house. In the agreement he is described as of the Junior United Service Club, S. W. The rent was £500 a year, and the term was for a year certain, with an option to the plaintiff

to continue the tenancy for another year, and if the house was not required by the landlord, then for a further term. Some time after the separation of the plaintiff and his wife this house was given up. After their separation they never lived together again. There were protracted negotiations carried on by their solicitors for a deed of separation. They were broken off before her death, because the plaintiff would not accept the conditions on which it was proposed on her part that an annuity should be settled on him. Her proposal was that the annuity should be a personal provision for his maintenance, and therefore determinable on bankruptcy or alienation; the plaintiff required that the annuity should be free of all restrictions, so that he could deal with it and raise money upon it. These negotiations were conducted throughout on the footing or tacit assumption that the law applicable to the relation of the parties was the law of England. The draft which passed between the solicitors was in English form; no suggestion was made from beginning to end by or on behalf of the plaintiff of a Scotch domicile, or that the law of Scotland had any bearing on the rights of the plaintiff and his wife. But, in justice to the plaintiff, it is proper to add that he was not designedly suppressing or keeping back any claim. He was not aware that he had any before the memorable conversation with his barrister friend after his wife's death. Still, the circumstance that these negotiations were conducted on the footing or assumption that the law of England applied has some bearing on the question of domicile. The object of the law in searching for and ascertaining a man's domicile is to ascertain the particular municipal law by which his private rights are regulated and defined. The circumstance that a foreigner residing in England by his conduct adopts the law of England as the law whereby his private rights are defined is relevant evidence on the question of his domicile. *Doucet v. Geoghegan*, 9 Ch. D. 441. The assumption in these negotiations, that the relative rights of the plaintiff and his wife were governed by the law of England, falls far short of an intentional adoption of that law, and if it stood alone it would be of trifling import, but, taken in connection with the other circumstances of the case, it is not altogether without weight. A few more facts remain to be noticed. The plaintiff was during the marriage a member of three clubs in London, — the Junior United Service Club, the Royal Thames Yacht Club, and the Raleigh. Shortly after his wife's death he became a member of the Arts and Letters Club, also in London. His wife was a member of the Albermarle Club in London. He never had a club in Scotland. After the separation he continued to reside chiefly in London. He had lodgings or furnished apartments in Suffolk Street, in Bedford Gardens, Kensington (where he stayed about a year), in Vauxhall Bridge Road, and in Cheniston Gardens, where he was when his wife died. He had a studio in Cheniston Gardens. He made a short expedition to Cairo, and he went round Scotland in the Norham Castle, accompany-

ing the ocean yacht race of 1887 as one of the Thanfes Yacht Club committee. This was the only visit, if it can be called a visit, which he paid to Scotland after the separation. In order to show that his domicile was Scotch, or, at all events, that it was not English, the plaintiff gave in evidence conversations which he had with his wife concerning Craignish. All these conversations occurred before he took No. 25, Albert Gate. The final conversation was at Fisher's Hotel, London. The plaintiff said his wife often talked to him about the possibility of his being able to buy Craignish. A friend had made inquiries and reported the result. The owner evidently did not intend to part with it at any price. He put a fancy price upon it; according to the plaintiff's recollection it was £80,000. To use the plaintiff's own expression, "That settled the matter of Craignish." It put an end to all ideas of his wife buying it. He never had any idea of purchasing it himself; as he truly stated, he had no money. It never really was within the range of practicability that even his wife should buy it. The £65,000 was so tied up that she could not dispose of any part of the capital during her life. She had a legacy of some thousand pounds under her father's will, but there was no evidence to show how much of this remained in her hands at the marriage. That a man with Scottish blood in his veins should have dreams of Scotland and an ancestral estate there is natural enough. This was but a waking dream, and the dream, such as it was, was the dream of his wife, and not of himself. A dream or a mere hope or a wish for the impossible is not an intention. There was no intention to buy Craignish. Whatever idea there was on the subject, it had finally vanished before the plaintiff took the house at Albert Gate. The plaintiff gave also some evidence as to his wife's making inquiries in regard to some other places in Scotland on their visits to that country, but nothing came of these inquiries, and these matters all came to an end before the house at Albert Gate was taken.

There is one peculiarity in this case which does not often arise in questions of domicile. Generally the inquiry relates to the domicile of a person who is dead. In this case the question relates to the domicile of the plaintiff, a living person. He gave evidence as to his past intention during his wife's life. Asked by his own counsel whether he formed any intention to make a settled home in England, he said, "No," and subsequently he said: "The only place I ever had any serious intention of making a home, if I could, was Scotland." In cross-examination he had admitted that there was no part of the United Kingdom where he had anything which could be called a home but in London; that any home he had was in London; and that certainly he had no other home but in London. As to the evidence of the plaintiff himself on the subject of his past intention, it must be accepted with a very considerable reserve. A plaintiff has naturally, on an issue like the present, a very strong bias cal-

culated to influence his mind, and he is, moreover, speaking of his past intention, and not merely of past declarations of intention. (See the observations of Lord Cairns in *Bell v. Kennedy*, Law Rep. 1 H. L., Sc. 307, 313.) Considerable light is thrown on the question whether the plaintiff did not himself consider that his home was in England by some of his own letters written to his wife after the separation. In these letters, written at various dates and from various places, the term "home" occurs seven times. I refrain from quoting at length the passages in the letters or the cross-examination upon them. They are, so far as they go, contemporaneous declarations of intention. The term "home" may be, and is, often used in different senses. An Englishman permanently settled in one of the English colonies may without impropriety speak of going home when he is paying a visit to England. If asked to explain himself, he would probably say that he used the term in reference to the mother country from which he and his brother colonists had emigrated or originally sprung, and that his own true home was in the colony. So in familiar conversation or in familiar letters the term may be used in a sense (varying more or less according to the accuracy of the speaker or writer from the ordinary popular sense) of the place where a man has his abode or is settled. When a traveller speaks of returning home he uses the term in the ordinary popular sense. In a letter of the plaintiff's (January 23, 1888), written from Corfu, where the plaintiff charges his wife with "breaking up our home," he was referring to their home at Albert Gate. This he admitted. In a passage in the same letter, where he asks "How can I go home?" he is referring to London, or at all events to England. In an undated letter from Alexandria, where the term "home" occurs three times, he uses it in the same sense of London or England. In the course of his examination-in-chief the plaintiff used the term "home" eight times, generally, however, following the lead of his counsel. When he is speaking of home before he finally quitted India, it is clear that he is using the term in the loose sense in which an Anglo-Indian may speak of this country as his home. After he left India, he uses it generally in reference to England as the place from which he started and to which he returned.

I have surveyed the evidence at some length. In the result, and on the assumption that the plaintiff's domicile of origin was Scotch, I find that the plaintiff acquired by choice a domicile in England from the time when he went to reside with his wife in the house at Albert Gate, and that the domicile thus acquired was not afterwards abandoned, but continued to the death of his wife. The evidence of the fact of residence here is amply sufficient. The true inference to be drawn from the evidence of the circumstances surrounding and accompanying the fact of the residence here, when taken in connection with the plaintiff's own letters and the other facts of the case viewed as a whole, appears to me to be that the plaintiff formed the intention

of residing here indefinitely. There was the *animus revertendi* and *manendi*. According to Story's definition, that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom. Story's Conflict of Laws, sect. 43. There was no present intention on the plaintiff's part to remove from London. London, which was at first merely his headquarters, afterwards became his home; he treated it as his home, and called it his home; more particularly he considered the house at Albert Gate, where he lived with his wife, as his home. A man may be in fact homeless, but he cannot in law be without a domicile. Subject to this distinction the term "home," in its ordinary popular sense, is practically identical with the legal idea of domicile. Dicey on Domicile, pp. 42-55. Living in lodgings and changing the lodgings from time to time are circumstances to be taken into consideration on a question of domicile; they are not inconsistent with domicile. There are many foreigners resident and domiciled in this country who pass their lives in lodgings only; a man may be domiciled in a country without having a fixed habitation in some particular spot in that country. The plaintiff's lodgings or apartments were all within the area of London. If (as I think was the case) the plaintiff's domicile was English in January, 1886, there is no sufficient evidence to show subsequent abandonment of that domicile. The subsequent breaking up of the house at Albert Gate is attributed by the plaintiff to his wife; even if it were his own act it would not of itself constitute an abandonment of a home or domicile in England. For the period of two and a half years which elapsed between the separation and his wife's death the plaintiff's principal place of residence was in London; he quitted London only for the temporary purpose of his short trips abroad. The plaintiff's counsel relied on the decision in *In re Patience*, 29 Ch. D. 976. On a question of fact a decision in a previous case affords little or no assistance. In that case I thought there was not sufficient evidence of intention. In this case I think there is. The action is dismissed with costs.

The plaintiff appealed.

LINDLEY, L. J., in delivering judgment, went through the facts of the case, and expressed the opinion that the plaintiff had not a Scotch domicile at the time of his wife's death. His Lordship accordingly held that the decision of Mr. Justice Chitty was right, and that the appeal must be dismissed with costs.

BOWEN and KAY, L.JJ., concurred.<sup>1</sup>

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POLLOCK, C. B., in *ATTORNEY-GENERAL v. POTTINGER*, 6 H. & N. 733, 744 (1861). The question is, whether Sir Henry Pottinger at the

<sup>1</sup> *Acc. Merrill v. Morrisett*, 76 Ala. 433; Dalloz, Repert. vol. xvii. p. 396. *Contra*, *In re Patience*, 29 Ch. D. 976. Cf. *Desmare v. U. S.*, 93 U. S. 605. — ED.

time of his decease was domiciled in England or in India. . . . The only doubt arises from this, that he continued in the service of the East India Company, and might have been called upon at any time to serve in India. In *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285, which was cited to establish that because an Indian officer continued liable to be called upon to serve in India he could not acquire an English domicile, the court decided that such circumstances constituted a strong reason against such an officer acquiring a French domicile. But the distinction between a foreign and an English domicile is pointed out in the judgment, and Lord Cranworth in the course of Dr. Phillimore's reply, said: "If the deceased had gone to Scotland on furlough, and resided there as long as he did in France, it would be difficult to say that he had not acquired a Scotch domicile." Applying that to this case, I think that, notwithstanding Sir Henry Pottinger continued in the Indian army, his purchase of a dwelling-house in Eaton Place, his continuing to hold it whilst absent from England, his return to it as his place of residence and his home, and his reference to it in his will as his residence, abundantly establishes his English domicile.<sup>1</sup>

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PUTNAM *v.* JOHNSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1813.

[*Reported 10 Massachusetts, 488.*]

CASE against the selectmen of Andover for refusing to insert plaintiff's name on the voting-list of the town.<sup>2</sup> At the trial of the action, which was had upon the general issue before SEWALL, J., at the Sittings here after this term, a verdict was found for the plaintiff, subject to the opinion of the court upon certain facts agreed by the parties, and certain evidence given at the trial, and reported by the judge who presided thereat.

It was admitted that the plaintiff was born in Danvers, on the 24th day of November, 1786; that he resided there, in his father's family, until he entered Dartmouth College, in August, 1805; that he was graduated at the said college in 1809; that he then went to Salem, and resided there as a student at law until the 13th of April, 1812, when he went to Andover; that he resided in Andover during the vacation of six weeks [in the theological seminary] in May and June, 1812, and of the vacation of six weeks in the autumn of that year he spent about half at his father's house in Danvers, and in visits to different places; that he did, on the first Monday of April, 1813, request the defendants to insert his name upon the list of

<sup>1</sup> *Acc. Moor v. Harvey*, 128 Mass. 219.

In *Hamilton v. Dallas*, 1 Ch. D. 257 (1875), it was held that a British peer, though a member of the House of Lords, may acquire a domicile in France. — Ed.

<sup>2</sup> This short statement is substituted for the declaration, given by the Reporter. — Ed.



voters in Andover, for senators; that they refused to insert it; that at the said meeting he offered his vote for senators, and the defendants refused to receive it; that he possessed sufficient personal estate; and that he was taxed in Salem in the years 1810 and 1811, and paid his taxes, and voted in said town after March, 1810, until he left that place in April, 1812.

The judge also reported that Eleazar Putnam, the father of the plaintiff, testified that his son, since he left college, had received no support from him, or any assistance except in the way of credit to him, and was not of the father's family, but separated, and, as the father believed, was upon the charity foundation at Andover, and that he owned some real estate. Mark Newman, Esquire, testified that the plaintiff was upon the charity foundation in the theological seminary at Andover; that students in divinity on that foundation are restricted to a residence of three years before they are entitled to a license to preach, and are permitted to continue their residence there afterwards; that the residence of students is in chambers, as at a college, with board in commons; that he had not known of any students in the theological institution who had been admitted to vote, and that they had not taken any concern in town affairs; that a Mr. Scammon, in 1812, while a student, claimed a right to vote, and was refused; and that theological students, when licensed to preach and employed as candidates for the ministry, reside and make their home at the institution, and in the vacations generally go from thence, but sometimes continue there.<sup>1</sup>

PARKER, J. The plaintiff, being a citizen of the commonwealth, more than twenty-one years of age, and of competent property, is without doubt entitled to vote somewhere within the State for State officers.

By the facts reported in this case, it is manifest that Andover or Danvers is the place where the plaintiff has his home, within the true intent of the constitution. Although he was born in Danvers, and that is still the domicile of his father, yet he was of an age to emancipate himself, and obtain a home in some other town. He went to Andover, and had resided there a few days short of a year, previous to the election in April, 1813. A year's residence was not necessary to entitle him to vote in that town; it was sufficient that he made that his home. He had left his father's family several years before, and had become a resident in Salem, where he was taxed and permitted to vote. His father had ceased to support him since the year 1809, before which time he was also of age; and he was at Salem, preparing himself for an independent living, until the spring of 1812, when he removed to Andover, to pursue his theological studies there, which, as he was on the charitable foundation, required a residence of three years.

<sup>1</sup> Arguments of counsel are omitted. — Ed.

Was Andover, then, his dwelling-place or home? This is the question now to be solved. It is manifest that Danvers was not; for he had abandoned it, and did not keep up his connection with his father's family, as was the case of Emmons in *Granby v. Amherst*, 7 Mass. 1, cited in the argument. He could not vote in Danvers, for his home was not there. He must, then, have a right to vote in Andover, or be subjected to a temporary disfranchisement, in consequence of his having no home in any place.

The objection most insisted on by the counsel for the defendants is, that the plaintiff did not go to Andover with an intention to remain there; but merely for the purpose of instruction, and therefore that he could not exercise any of his civil privileges within that town; although it was admitted that a mechanic or day-laborer, otherwise qualified, making Andover his home, by residing and dwelling there, would be a legal voter there.

A residence at a college or other seminary, for the purpose of instruction, would not confer a right to vote in the town where such an institution exists, if the student had not severed himself from his father's control, but resorted to his house as a home, and continued under his direction and management. But such residence will give a right to vote to a citizen not under pupilage, notwithstanding it may not be his expectation to remain there forever.

The definition of domicile, as cited from Vattel by the counsel for the defendants, is too strict, if taken literally, to govern in a question of this sort; and, if adopted here, might deprive a large portion of the citizens of their right of suffrage. He describes a person's domicile as the habitation fixed in any place, with an intention of always staying there. In this new and enterprising country, it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain. Probably the meaning of Vattel is, that the habitation fixed in any place, without any present intention of removing therefrom, is the domicile. At least, this definition is better suited to the circumstances of this country.

But several cases have been cited from our own reports, which are supposed to be analogous to the case at bar, in which the settlement of paupers has been decided upon more strict principles than are now suggested. The case of *Granby v. Amherst* is the strongest; and it is manifest that there is nothing, even in that case, which contradicts the principles now advanced. The pauper there left Belchertown and went to Dartmouth College, merely for the purpose of education. He was under age while at college, until a few months before he was graduated. He passed all his vacations in Belchertown, he had a

freehold there, and he returned to that place as soon as he had taken his degree. It was very properly held that, under these circumstances, he had not changed his domicile by going to Dartmouth College, and remaining there four years.<sup>1</sup>

But the decisions of settlement cases cannot have much influence on questions of political privileges. In the former cases, there is a conflict between two corporations on a subject of property; and they must be determined strictly according to the established rules of property. The objects intended to be secured by the constitutional limitation of the right of suffrage to the town in which the voter has his home, were opportunity to ascertain the qualifications of the voter, and the prevention of fraud upon the public by multiplying the votes of the same person. The plaintiff had lived long enough in Andover to give the selectmen the means of scrutinizing his claims; and there was no other place where he could have a pretence for voting.

Further, a citizen may well have his home in one town, with all the privileges of an inhabitant, and yet have his legal settlement in another town. For instance, if he should reside four years in a town, own and occupy real property there, gain a livelihood there for himself and his family, without any intention of removing, he might, notwithstanding, be removed to the place of his lawful settlement, in case he should become chargeable. But it would be hard to say he had no home there, that he did not dwell there, and therefore that he should not be permitted to vote there.

We are all of opinion that the plaintiff's case is well made out, and that judgment must be entered on the verdict.<sup>2</sup>

## ABINGTON *v.* NORTH BRIDGEWATER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1840.

[*Reported 23 Pickering, 170.*]

SHAW, C. J., drew up the opinion of the court.<sup>3</sup> The question of Ebenezer Hill's settlement depends upon this, whether he was an inhabitant of North Bridgewater before the 10th of April, 1767. If his house or place of residence was in that town, he acquired a settlement there, and the defendants are liable, otherwise not.

In the several provincial statutes of 1692, 1701, and 1767 upon this subject, the terms "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," "coming to reside

<sup>1</sup> *Acc. Vanderpoel v. D'Hanlon*, 53 Ia. 246; *Frye's Election*, 71 Pa. 302. — Ed.

<sup>2</sup> *Acc. Sanders v. Getchell*, 76 Me. 158; *Hicks v. Skinner*, 72 N. C. 1.

Residence for voting means actual domicile. *Dennis v. S.*, 17 Fla. 389. — Ed.

<sup>3</sup> The opinion only is given: it sufficiently states the case. — Ed.

and dwell," are frequently and variously used, and, we think, they are used indiscriminately, and all mean the same thing, namely, to designate the place of a person's domicile. This is defined in the Constitution, c. 1, § 1, for another purpose, to be the place "where one dwelleth or hath his home."

The fact of domicile is often one of the highest importance to a person; it determines his civil and political rights and privileges, duties and obligations; it fixes his allegiance; it determines his belligerent and neutral character in time of war; it regulates his personal and social relations whilst he lives, and furnishes the rule for the disposal of his property when he dies. Yet as a question of fact, it is often one of great difficulty, depending sometimes upon minute shades of distinction, which can hardly be defined. It seems difficult to form any exact definition of domicile, because it does not depend upon any single fact, or precise combination of circumstances. If we adopt the above definition from the Constitution, which seems intended to explain the matter and put it beyond doubt, it will be found, on examination, to be only an identical proposition, equivalent to declaring, that a man shall be an inhabitant where he inhabits, or be considered as dwelling or having his home where he dwells or has his home. It must often depend upon the circumstances of each case, the combinations of which are infinite. If it be said to be fixed by the place of his dwelling-house, he may have dwelling houses in different places; if it be where his family reside, his family with himself may occupy them indiscriminately, and reside as much in one as another; if it be where he lodges or sleeps (*pernoctat*), he may lodge as much at the one as the other; if it be his place of business, he may have a warehouse, manufactory, wharf, or other place of business, in connection with his dwelling-house in different towns. See *Lyman v. Fiske*, 17 Pick. 231. But without pursuing this general view further, to show that it is difficult, if not impossible, to lay down any general rule, on account of the very diversified cases which may be supposed, yet it will generally be found in practice, that there is some one or a few decisive circumstances which will determine the question.

In coming to the inquiry in each case, two considerations must be kept steadily in view, and these are, —

1. That every person must have a domicile somewhere; and
2. That a man can have only one domicile, for one purpose, at one and the same time.

Every one has a domicile of origin, which he retains until he acquires another; and the one thus acquired is in like manner retained.

The supposition, that a man can have two domiciles, would lead to the absurdest consequences. If he had two domiciles within the limits of distant sovereign States, in case of war, what would be an act of imperative duty to one, would make him a traitor to the other. As not only sovereigns, but all their subjects, collectively and indi-

vidually, are put into a state of hostility by war, he would become an enemy to himself, and bound to commit hostilities and afford protection to the same persons and property at the same time.

But without such an extravagant supposition, suppose he were domiciled within two military districts of the same State, he might be bound to do personal service at two places, at the same time; or in two counties, he would be compellable, on peril of attachment, to serve on juries at two remote shire towns; or in two towns, to do watch and ward in two different places. Or, to apply an illustration from the present case. By the provincial laws cited, a man was liable to be removed by a warrant to the place of his settlement, habitancy, or residence, for all these terms are used. If it were possible that he could have a settlement or habitancy in two different towns at the same time, it would follow that two sets of civil officers, each acting under a legal warrant, would be bound to remove him by force, the one to one town, and the other to another. These propositions, therefore, that every person must have some domicile, and can have but one at one time, for the same purpose, are rather to be regarded as *postulata* than as propositions to be proved. Yet we think they go far in furnishing a test by which the question may be tried in each particular case. It depends not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, over-balance all the like proofs, tending to establish it in another; such an inquiry, therefore, involves a comparison of proofs, and in making that comparison, there are some facts which the law deems decisive, unless controlled and counteracted by others still more stringent. The place of a man's dwelling-house is first regarded, in contradistinction to any place of business, trade, or occupation. If he has more than one dwelling-house, that in which he sleeps or passes his nights, if it can be distinguished, will govern. And we think it settled by authority, that if the dwelling-house is partly in one place and partly in another, the occupant must be deemed to dwell in that town in which he habitually sleeps, if it can be ascertained.

Lord Coke, in 2 Inst. 120, comments upon the statute of Marlbridge respecting courts leet, in which it says, that none shall be bound to appear, *nisi in bailiis ubi fuerant conversantes*; which he translates, "but in the bailiwicks, where they be dwelling." His Lordship's comment is this: "If a man have a house within two leets, he shall be taken to be conversant where his bed is, for in that part of the house he is most conversant, and here conversant shall be taken to be most conversant." This passage, at first blush, might seem to imply that the entire house was within two leets. But no man can be of two leets. 2 Dong. 538; 2 Hawk. P. C. c. 10, § 12. Indeed, the whole passage, taken together, obviously means, a house partly within one leet and partly within another; otherwise, the bed would be within the two leets, as well as the house.

It is then an authority directly in point to show, that if a man has a dwelling-house, situated partly within one jurisdiction and partly in another, to one of which the occupant owes personal service, as an inhabitant, he shall be deemed an inhabitant within that jurisdiction within the limits of which he usually sleeps.

The same principle seems to have been recognized in other cases, mostly cases of settlement, depending on domicile. *Rex v. St. Olaves*, 1 Str. 51; *Colechurch v. Radcliffe*, 1 Str. 60; *Rex v. Brighton*, 5 T. R. 188; *Rex v. Ringwood*, 1 Maule & Selw. 381.

I am aware that the same difficulty may arise as before suggested, which is, that the occupant may not always, or principally, sleep in one part of his house, or if he sleeps in one room habitually, the dividing line of the towns may pass through the room or even across his bed. This, however, is a question of fact depending upon the proofs. When such a case occurs, it may be attended by some other circumstance decisive of the question. If the two principles stated are well established, and we think they are, they are, in our opinion, sufficient to determine the present case. It becomes, therefore, necessary to see what were the facts of this case, and the instructions in point of law upon which it was left to the jury.

The plaintiffs contended that two monuments pointed out by them were true and genuine monuments of the Colony line, and if so, a straight line drawn from one to the other would leave the house wholly in North Bridgewater, and the jury were instructed, if they so found, to return a verdict for the plaintiffs. But the jury stated, on their return, that on this point they did not agree, and therefore that part of the instruction may be considered as out of the case. It is therefore to be taken that, in point of fact, the line ran through the house, leaving a small part in Randolph and a large part in North Bridgewater. In reference to this, the jury were instructed, that if that line would leave a habitable part of the house in Randolph, the verdict should be for the defendants; otherwise, for the plaintiffs. The jury were also directed to find, specially, whether the beds of the family in which they slept, and the chimney and fireplace, were or were not in North Bridgewater. The jury found a verdict for the plaintiffs, which in effect determined, in point of fact, that the line did run through the house, leaving a small part in Randolph, that the beds and fireplaces of the house were on the North Bridgewater side of the line, and that there was not a habitable part of the house in Randolph.

What was the legal effect of this instruction to the jury? To understand it, we must consider what was the issue. The burden of proof was upon the plaintiffs, to prove that Hill had his settlement in North Bridgewater. But proving that he had a dwelling-house, standing partly in North Bridgewater and partly in Randolph, would leave it wholly doubtful whether he had his domicile in the one or the other, provided that the line passed the house in such a direction

as that either would have been sufficient for the purpose of a habitation; because it would still be doubtful whether he dwelt upon one or the other side of that line. But if the line ran in such a direction as to leave so small a portion on one side that it could not constitute a human habitation, then the position of the dwelling determined the domicile. In any other sense, we see not how the correctness of the instruction could be maintained. If the term "habitable part of the house" was intended to mean a portion of the house capable of being used with the other part for purposes of habitation, and the whole constituting together a place of habitation, then every part of the house capable of being used would be a habitable part. The instruction was, that if a habitable part was in Randolph, the occupant did not acquire a domicile in North Bridgewater; it would be equally true in law, that if a habitable part was in North Bridgewater, he did not acquire a domicile in Randolph. If the term "habitable," then, were used in the restricted sense, capable of being used as a part, and not as the whole of a human habitation, the instruction would amount to this, that living ten years in a dwelling-house divided by an imaginary line into parts, both of which are useful and capable of being used as parts of a dwelling-house, the occupant would acquire no domicile. But this is utterly inconsistent with the principles of domicile. By leaving his domicile in Abington, and living in the house in question, Hill necessarily lost his domicile in Abington, and necessarily acquired one by living in that house; and this must be in either Randolph or Bridgewater, and not in both. It may be impossible, from lapse of time and want of evidence, to prove in which, and therefore the plaintiffs, whose case depends on proving affirmatively that it was in North Bridgewater, may fail; nevertheless it is equally true, in itself, that he did acquire a domicile in one, and could not acquire one in both of those towns. Suppose the proof were still more deficient; suppose it were proved beyond doubt, that Hill lived in a house situated on a cleared lot of one acre through which the town line were proved to run, but it were left uncertain in the proof on which part of the lot the house was situated. It would be true that he lost his domicile in Abington, and acquired one in Randolph or North Bridgewater; but it being entirely uncertain which, the plaintiffs would fail of proving it in North Bridgewater, and therefore could not sustain their action. So if the line ran through a house in such a manner that either side might afford a habitation, then dwelling in that house would not of itself prove in which town he acquired his domicile, though he must have acquired it in one or the other. In this sense we understand the instruction to the jury, and in this sense we think it was strictly correct. If they should find that the line so ran through the house as to leave a part capable, of itself, of constituting a habitation, in Randolph, then dwelling in that house, though partly in North Bridgewater, did not necessarily prove a domicile in North Bridgewater.

Under this instruction the jury found a verdict for the plaintiffs, and we think it is evident from this verdict, that they understood the instruction as we understand it. The jury find that one corner of the house, to the extent of two feet and one inch, was in Randolph, but that no habitable part of the house was in Randolph; not, as we think, no part capable of being used with the rest of the house for the purpose of habitation, but no part capable, of itself, of constituting a habitation; from which they draw the proper inference, that the habitation and domicile, and consequently the settlement, was in North Bridgewater.

And if we look at the fact, specially found by the jury, we are satisfied that they drew the right conclusion, and could come to no other. If the line had divided the house more equally, we think, on the authorities, that if it could be ascertained where the occupant habitually slept, this would be a preponderating circumstance, and, in the absence of other proof, decisive. Here it is found, that all the beds, the chimney and fireplace, were within the North Bridgewater side of the line, and that only a small portion of the house, and that not a side but a corner, was within the Randolph side, and that so small as to be obviously incapable of constituting a habitation by itself. We think, therefore, that the instruction was right, and the verdict conformable to the evidence.

*Judgment on the verdict for the plaintiffs.*<sup>1</sup>

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### HAGGART v. MORGAN.

COURT OF APPEALS, NEW YORK. 1851.

[*Reported 5 New York, 422.*]

GARDINER, J.<sup>2</sup> The defendants at the trial offered to prove "that at the time of taking out the attachment mentioned in the pleadings, and at the time of the giving of the bond in suit, the debtor, Brandedge, was not a non-resident of the city of New York, but a resident. That he had been absent about three years, in attending a law-suit at New Orleans, and returned in the spring of 1848." The judge excluded the evidence on the grounds, — 1st, That the offer itself showed the debtor to be a non-resident, at the time when the attachment issued, within the spirit of the act; 2d, that the giving of the bond to discharge the attachment prevented him from showing such fact; and the defendant excepted. This exception presents the only question in the cause worthy of serious consideration.

The ruling of the judge was probably correct for the reasons assigned by him. In the matter of Thompson, 1 Wend. 45, the distinc-

<sup>1</sup> *Acc. Judkins v. Reed*, 48 Me. 386. — ED.

<sup>2</sup> Part of the opinion only is given. — ED.



tion was taken between the residence of the debtor and his domicile. It was there held that his residence might be abroad, within the spirit of the statute, which was intended to give a remedy to creditors whose debtors could not be served with process, while his domicile continued in this State. In *Frost v. Brisbin*, 19 Wend. 14, it was said, in a case like the present, that actual residence, without regard to the domicile of the defendant, was within the contemplation of the statute. It was part of the offer of the defendants to prove that the debtor left this State in November, 1844, and returned in the spring of 1848, and that this absence of three years and a half was necessary to accomplish the business in which he was engaged. He was therefore a non-resident when the attachment was issued, within these decisions, although domiciled in New York.<sup>1</sup>

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### WILLIAMS v. ROXBURY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1858.

[*Reported 12 Gray, 21.*]

ACTION of contract to recover back the amount of a tax assessed on the 1st of May, 1856, upon personal property held by the plaintiff as trustee under the will of John D. Williams, for the benefit of Mrs. Sarah A. W. Bradlee, formerly Miss Merry, and paid under protest. The parties agreed that if, in the opinion of the court, upon so much of the following facts as would be admissible in evidence, Richards Bradlee, her husband, was a resident of Brookline, judgment should be rendered for the plaintiff; otherwise, for the defendants.

Richards Bradlee was born in Brattleboro, Vt., lived there until the age of sixteen, then went to New York, and there remained until after he became of age in the spring of 1855, when he returned to Brattleboro for the purpose of finding some employment, but with a view of going to the West, and, after passing the summer in Brattleboro, went to St. Louis in October in search of employment, and entered a store as a clerk, but under no contract for any fixed length of time; and in the following winter at St. Louis met Miss Merry, who resided in Roxbury, and became engaged to marry her. He never had any intention of making Roxbury his residence. In

<sup>1</sup> *Acc. Krone v. Cooper*, 43 Ark. 547; *Ludlow v. Szold*, 90 Ia. 175, 57 N. W. 676 (see, however, *Church v. Crossman*, 49 Ia. 444); *Risewick v. Davis*, 19 Md. 82; *Alston v. Newcomer*, 42 Miss. 186; *Johnson v. Smith*, 43 Mo. 499; *Long v. Ryan*, 30 Grat. 718. *Contra*, *Wood v. Roeder*, 45 Neb. 311, 63 N. W. 853; *Stratton v. Brigham*, 2 Sneed, 420. And see *Ballinger v. Lantier*, 15 Kan. 608; *Clark v. Likens*, 26 N. J. L. 207.

A similar rule prevails as to "settlement" or "residence" in poor-law cases. *Jefferson v. Washington*, 19 Me. 293; *North Yarmouth v. West Gardiner*, 58 Me. 207. — Ed.

March, 1856, he hired a house in Brookline, at a rent to begin on the 1st of April, for the residence of himself and his wife; visited it with her several times to set up the furniture; put a housekeeper and servants in charge of it, and removed into it his and Miss Merry's movable property. They were married in Roxbury on the 9th of April, and on the same day started on a wedding tour, with the intention of returning, not to Miss Merry's former residence in Roxbury, but to the furnished house in Brookline, and on the 2d of May did return to that house.

*C. A. Welch*, for the plaintiff.

*W. Gaston*, for the defendants.

SNOW, C. J. The question of domicile is a question of fact. It is a question of comparison of facts. Had Mr. Bradlee previously had a clear, fixed, and decided domicile, the circumstances would hardly be sufficient to show an acquisition of a domicile in Brookline. But when we compare the facts, we are brought to the opposite result. Brattleboro was his domicile of origin, but he scarcely ever visited there, and soon after coming of age went to St. Louis, and was there three or four months as a clerk, and there formed a marriage engagement with Miss Merry. He then came to Massachusetts, without any intention to return to St. Louis with his wife. But he came to Massachusetts to fulfil his engagement. He acquired no domicile at Roxbury. He took a lease of a house in Brookline in March, the rent to commence on the 1st of April; took possession; put in a housekeeper; visited the house for the purpose of putting up furniture, and removed all his own and his wife's property to it, before their marriage. His subsequent absence was only temporary; he left on a marriage tour, with the intention to return to live in Brookline, and on his return he took actual possession of the house which he had hired. Our conclusion is that upon a balance of all the facts the domicile was in Brookline, and that

*The plaintiff is entitled to judgment.*<sup>1</sup>

## GILMAN v. GILMAN.

SUPREME JUDICIAL COURT OF MAINE. 1863.

[Reported 52 Maine, 165.]

DAVIS, J.<sup>2</sup> This case comes before us upon an appeal from a decree of the Probate Court, admitting to probate and allowing the

<sup>1</sup> *Acc. Mann v. Clark*, 33 Vt. 55.

If the fact of residence and the intention to stay indefinitely concur, a domicile is gained at once, for however short a time the residence or the intent continues. *Parsons v. Bangor*, 61 Me. 457; *Stockton v. Staples*, 66 Me. 197; *Thorndike v. Boston*, 1 Met. 242; *McConnell v. Kelley*, 138 Mass. 372; *Horne v. Horne*, 9 Ired. 99. — ED

<sup>2</sup> The opinion only is given: it sufficiently states the case. — ED.

last will and testament of Nathaniel Gilman. It was proved by a copy, the original being beyond the jurisdiction of the court.

The validity of the will is not questioned. But the testator left a large amount of property in the city of New York as well as in this State; and the will has been proved and allowed there, on proof of its execution merely, without any inquiry in regard to domicile. The Surrogate seems to have assumed that jurisdiction of the property conferred original jurisdiction of the will, whether the testator's domicile was there or elsewhere. Even if his decree were conclusive, which cannot be admitted, no decree was made by him upon that point, or that was intended to settle it, as a judgment binding upon the courts of any other State.

If the domicile of the testator, at the time of his death, was in New York, then his will should be allowed and recorded in this State as a foreign will. R. S., c. 64, § 8. And, in that case, the movable property in this State would be disposed of, under the will, according to the laws of the State of New York. Jarman on Wills, 2. But if his domicile was in this State, then the Probate Court here has original jurisdiction, and our laws must govern the construction of the will, and the disposal of the property. *Harrison v. Nickerson*, 9 Pet. 483; *Story's Conflict of Laws*, § 481; *Bempde v. Johnstone*, 3 Ves. 199.

It would be well, if possible, to have a distinct and clear idea of what we mean by the term "domicile," before applying it to this case. It is no easy matter, however, to find a definition that has not been questioned. Vattel defines it as "the habitation fixed in any place, with an intention of always staying there." This is quoted with approbation by Savage, C. J., in *Thompson's Case*, 1 Wend. 43; and in the case of *Roberts' Will*, 8 Paige, 519, Chancellor Walworth adopts it in substance. "Domicile is the actual residence of an individual at a particular place, with the *animus morandi*, or a fixed and settled determination to remain there the remainder of his life." This was slightly varied in Massachusetts, by Wilde, J., in *Jennison v. Hapgood*, 10 Pick. 77, where it is said to be a residence at a place "accompanied with the intention to remain there permanently, or at least for an indefinite time." Vattel's definition was questioned by Parker, J., in *Putnam v. Johnson*, 10 Mass. 488, in which "domicile" is said to be "the habitation fixed in any place, without any present intention of removing therefrom." This form has been recognized in this State as more nearly correct than any of the others. *Warren v. Thomaston*, 43 Maine, 406.

All definitions of this kind were criticised, with much force, by Lord Campbell, C. J., in the case of *Regina v. Stapleton*, 18 Eng. Law and Eq. 301, in which he suggests that, if one should go to Australia, with the intention of remaining there ten years, and then returning, his domicile could hardly be said to continue in England. If he should leave his family in England, as stated in the supposed

case, his domicile might properly be considered there. But, if a citizen of Maine, with his family, or having no family, should go to California, to engage in business there, with the intention of returning at some future time, definite or indefinite, and should establish himself there, in trade or agriculture, it is difficult to see upon what principle his domicile could be said still to be here. His residence there, with the intention of remaining there a term of years, might so connect him with all the interests and institutions, social and public, of the community around him, as to render it not only proper, but important, for him to assume the responsibilities of citizenship, with all its privileges and its burdens. Such residences are not strictly within the terms of any definition that has been given; and yet it can hardly be doubted that they would be held to establish the domicile.

Other definitions have been given, which, though more general, are better adapted to determine the case at bar. Thus Story, in his *Conflict of Laws*, says that one's domicile is "his true, fixed, permanent home, and principal establishment, to which, whenever he is absent, he means to return." And, in *Munroe v. Munroe*, 7 Cl. & Fin. 877, Lord Cottenham says that, to effect the abandonment of one's domicile, and to substitute another in its place, "is required the choice of a place, actual residence in the place chosen, and that it should be the principal and permanent residence."

That the testator's original residence was in Waterville is admitted. There he established himself in business, accumulated property, was married, and owned a house, in which, either continuously or at intervals, he resided, with his family, until he died there in 1859.

It has been laid down as a maxim on this subject, that every person must have a domicile somewhere. *Abington v. North Bridgewater*, 23 Pick. 170. This may be doubtful in its application to some questions. A life may be so vagrant that a person will have no home in any city or town where he can claim any of the rights or privileges appertaining to that relation. But, in regard to questions of citizenship, and the disposition of property after death, every person must have a domicile. 1 Amer. Lead. Cas. 725, note. For every one is presumed to be a subject of some government while living; and the law of some country must control the disposition of his property upon his decease. It is therefore an established principle of jurisprudence, in regard to the succession of property, that a domicile once acquired continues until a new one is established. Therefore the testator's domicile must be considered in Waterville, for the purpose of settling his estate, unless he had not only abandoned it, but had actually acquired a new domicile in New York.

It appears in evidence that he commenced business in New York about 1831, at first being there transiently; that in 1836 or 1837, having been married a second time, he was in the habit of spending considerable time there with his family at the Astor House, and other

hotels; that he hired a house there, in which he lived portions of the year from 1841 to 1844; that he bought a house in Brooklyn, which he occupied at intervals from 1847 to 1852; that he bought a lot in Greenwood Cemetery, on which he built an expensive tomb; that, after 1836, his principal business was in New York, and that several of his children were married and settled there in business. But he never disposed of his house in Waterville; he always kept it furnished, in repair, and supplied with fuel; he kept a horse and carriage there; he generally spoke of Waterville as his home; and, with the exception of one or two years (and during those years he did not keep house anywhere else), he lived in his house there a portion of the year with his family.

A person may have two places of residence, for purposes of business or pleasure. *Thorndike v. Boston*, 1 Met. 242; *Sears v. Boston*, 1 Met. 250. But, in regard to the succession of his property, as he must have a domicile somewhere, so he can have only one. *Green v. Green*, 11 Pick. 410. It is not very uncommon for wealthy merchants to have two dwelling-houses, one in the city and another in the country, or in two different cities, residing in each a part of the year. In such cases, looking at the domestic establishment merely, it might be difficult to determine whether the domicile was in one place or the other. *Bernal v. Bernal*, 3 Mylne & Craig, 555, note. In the case of *Somerville v. Somerville*, 5 Ves. 750, 788, it is stated as a general rule, "that a merchant, whose business is in the metropolis, shall be considered as having his domicile there, and not at his country residence." But no such rule can be admitted. The cases differ, and are distinguished by other facts so important, that the domicile cannot always be held to be in the city. It is frequently the case that the only real home is in the country; so that, while some such merchants talk of going into the country to spend the summer, others, with equal propriety speak of going into the city to spend the winter.

If any general rule can be applied to such cases, we think it is this: that the domicile of origin, or the previous domicile, shall prevail. This is in accordance with the general doctrine, that the *forum origines* remains until a new one is acquired. 3 Kent, 431; *Kilburn v. Bennett*, 3 Met. 199; *Moore v. Wilkins*, 10 N. H. 455; *Hood's Case*, 21 Penn. 106. And this would generally be in harmony with the other circumstances of each case. If the merchant was originally from the country, and he keeps up his household establishment there, his residence in the city will be likely to have the characteristics of a temporary abode. While, if his original domicile was in the city, and he purchases or builds a country house for a place of summer resort, he will not be likely to establish any permanent relations with the people or the institutions of the town in which it is located.

If we apply this rule to the case at bar, it will bring us to the conclusion that the testator's domicile in Waterville remained un-

changed. Are there any facts that should make this case an exception to the rule?

The testator continued to vote in Waterville about one half of the time. There is no evidence that he ever voted in New York. His manner of life there, boarding generally at hotels, where he always registered his name as from "Maine," renders it probable that he never claimed or was admitted to be a voter in that city.

He paid a tax upon personal as well as real estate in Waterville, a few of the years after he went into business in New York. He does not appear ever to have paid any tax in the latter place but one year. He evidently belonged to that class of men, fortunately small in number, who have no stronger desire than to avoid the payment of taxes anywhere.

These facts have little tendency to establish anything but the intention of the testator. Residence, being a visible fact, is not usually in doubt. The intention to remain is not so easily proved. Both must concur in order to establish a domicile. *Harvard College v. Gore*, 5 Pick. 370. And, as both are known to be requisite in order to subject one to taxation, or to give him the right of suffrage, any resident who submits to the one, or claims the other, may be presumed to have such intention. Both parties claim that the will itself furnishes evidence of the testator's domicile. At most, it can be of little weight, except on the question of his intention. Such intention must relate to the future and not to the past. A will made at or near the close of life will not be likely to throw much light on that question. It must be an intention to reside. An intention to dispose of his property according to the laws of any place, does not tend to fix the testator's domicile there. So that, if the will is made in conformity with our laws, and even if, as is contended, some of its provisions would be void by the laws of New York, that cannot affect the question of domicile. *Hoskins v. Matthews*, 35 Eng. Law and Eq. 532; *Anstruther v. Chalmers*, 2 Simons, 1. Nor, on the other hand, does the fact that he described himself, in the will, and in the codicil, as "of the city and State of New York," make any material difference. *Whicker v. Hume*, 5 Eng. Law and Eq. 52.

During the last twenty years of the testator's life, his ruling purpose seems to have been to accumulate property abroad, and escape taxation there and at home. This led him to sacrifice, to a large extent, the enjoyments of domestic life, and to sever or neglect all those social ties which might have given him position and influence in the community. He pursued this process of isolation, because, while it did not interfere with his gains, it diminished his expenses. This was what rendered his domicile a question of doubt. This is what gives to the testimony, as it gave to his life, an aspect of inconsistency and contradiction. But through it all there is apparent an intention to retain his home in Waterville, as a place of retreat for himself during life, and a place of residence for his family after his

decease. He never had any such home elsewhere. And, upon the whole evidence, we are satisfied that his domicile was never changed. The decree of the Probate Court is affirmed, with costs for the appellees.<sup>1</sup>

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### WILBRAHAM v. LUDLOW.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[*Reported 99 Massachusetts, 587.*]

FOSTER, J.<sup>2</sup> The question in the present case was, whether the pauper, whose settlement was once in the plaintiff town of Wilbraham, had acquired a new settlement in Ludlow. The burden of proof to establish this was on the plaintiffs. After the presiding judge had announced the rule of law which he deemed to govern the case, and the instructions which he proposed to give to the jury, the plaintiffs declined to argue the case, submitted to a verdict for the defendants, and alleged exceptions. Under these circumstances, the only question open for revision is the correctness of the rulings. The evidence is not for the court to pass upon, and is reported only to make the instructions intelligible and enable us to judge better whether they were pertinent and accurate.

The pauper leased his house in Ludlow in June, 1857, and never lived in it again. He remained in that town, working as a laborer, until August in that year. He then went to his brother's house in Wilbraham, and afterwards worked about, as a day laborer, in the towns of Wilbraham, Springfield, and Ludlow, till October, 1861, after which he remained in Wilbraham in the family of Horace Clark, who was about that time appointed his guardian, until he was committed as an insane pauper to the hospital at Northampton. The proposition to be maintained by the plaintiffs was, that after August, 1857, he continued to reside in Ludlow within the meaning of the pauper laws; so that a settlement in that town could be subsequently acquired. There was certainly no actual continuance of his former home in that town; it was broken up and he had abandoned it, apparently without any intention to return there to live. But the argument for the plaintiffs is, that the pauper's domicile remained in Ludlow until he acquired a new one in some other town, and that, while absent in fact, he continued to live there in contemplation of law, and by such constructive residence the prescribed period for acquiring a settlement was completed.

Assuming that this view of the law is correct, and that domicile and residence are identical under the pauper laws, we are nevertheless of opinion that the rule of law stated to the jury was correct. If, from

<sup>1</sup> *Acc. Somerville v. Somerville, 5 Ves. 750; Harvard College v. Gore, 5 Pick. 370.*  
— Ed.

<sup>2</sup> The opinion only is given: it sufficiently states the case. — Ed.

the time the pauper left Ludlow in August, 1857, he had "no opinions, desires, or intentions in relation to residence, except to have a home wherever he worked," then he did have in each successive town where he lived as a laborer a home and domicile so long as he remained there. It must be borne in mind that this was the case of one who had abandoned his former dwelling-place, either with no intention of return, or at the most with such vague, indefinite, and remote purposes in this respect that they would not prevent him from readily acquiring a new domicile wherever he might go. The person was a day laborer without family, separated by judicial decree from his wife. Such a man, so situated, when he is laboring in one town with no other intention as to residence except to have a home wherever he works, may well be deemed to live there with the purpose of remaining for an indefinite period of time, and thus to have there all the home he has anywhere, as much of a domicile as such a wanderer can have. At least it was competent for the jury to come to that conclusion; and the instructions under which they did so were unobjectionable.

It is unnecessary to attempt a precise definition of the term domicile, as to which that eminent English judge, Dr. Lushington, has said that, "although so many powerful minds have been applied to the question, there is no universally agreed definition of the term, no agreed enumeration of the ingredients which constitute domicile." *Maltass v. Maltass*, 1 Rob. Ecc. 74. Story Conf. Laws, c. 3. Our own adjudged cases sufficiently establish the rule that one who is residing in a place with the purpose of remaining there for an indefinite period of time, and without retaining and keeping up any *animus revertendi*, or intention to return, to the former home which he has abandoned, will have his domicile in the place of his actual residence. *Sleeper v. Paige*, 15 Gray, 349; *Whitney v. Sherborn*, 12 Allen, 111. Where the question is one of national domicile, this statement may not be correct; for such a condition of facts might not manifest an intention of expatriation. But it is accurate enough for cases like the present, which relate to a change of domicile from one place to another within the same Commonwealth.

*Exceptions overruled.*<sup>1</sup>

### BANGS v. BREWSTER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[Reported 111 Massachusetts, 382.]

MORTON, J.<sup>2</sup> The question at the trial was whether the plaintiff had on May 1, 1869, acquired a domicile in Orleans. There is no doubt as

<sup>1</sup> "A sea captain, who has neither domicile nor residence abroad, whose domicile of origin, being abandoned long ago, without intention of returning, should be considered as lost, and who has no residence except on the steamer which he commands, is in the eye of the law, for the purpose of service of process on him, domiciled in the port where his vessel is moored at the time of service."—Court of Ghent (1891), 21 Clunet, 584. But see *Boothbay v. Wiscasset*, 3 Me. 354. — ED.

<sup>2</sup> Part of the opinion only is given. — ED.



to the rule of law that the plaintiff's domicile of origin in Brewster adhered to him until he had acquired a domicile somewhere else, and that in order to effect a change of domicile he must not only have had the intent to make his home in some other town, but he must in fact have made his home there. The intent and the act must concur, and until the intent was consummated by an actual removal of his home, no change of domicile was effected. *Whitney v. Sherborn*, 12 Allen, 111. *Carnoe v. Freetown*, 9 Gray, 357.

The question is as to the application of this rule to the facts of this case. The plaintiff was a shipmaster, most of whose time was spent at sea. He went to sea in November, 1867, taking his wife with him, and in December, 1868, he sent his wife to Orleans, and she arrived there in February, 1869. He did not arrive at Orleans until July, 1869, so that he was not personally present in Orleans on May 1, 1869. The special findings of the jury settle conclusively that when he went to sea in November, 1867, he had the definite intent to make Orleans his home, and that in December, 1868, he sent his wife to Orleans in pursuance of that intent. We think the jury were justified in finding that his domicile was in Orleans on the first of May.

By sending his wife to Orleans with the intent to make it his home, he thereby changed his domicile. The fact of removal and the intent concurred. Although he was not personally present, he established his home there from the time of his wife's arrival.<sup>1</sup>

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### DUPUY v. WURTZ.

COURT OF APPEALS, NEW YORK. 1873.

[Reported 53 New York, 556.]

RAPALLO, J.<sup>2</sup> When Mrs. Wurtz went to Europe with her husband, in 1859, she was domiciled in the city and State of New York. She and her husband were natives of the United States. It does not appear in the case that she ever had had any domicile except in this State, and it seems to be conceded on both sides that this was her domicile of origin.

<sup>1</sup> *Acc.* *Anderson v. Anderson*, 42 Vt. 350. *Contra*, *Hart v. Horn*, 4 Kan. 232. In *Porterfield v. Augusta*, 67 Me. 556 (1877), it was held that the husband's domicile could not thus be changed if the wife's removal was without his prior consent. See further, *Fayette v. Livermore*, 62 Me. 229. If the wife removes, the husband remaining at the old domicile, their domicile is of course not changed. *Scholes v. Murray Iron Works Co.*, 44 Ia. 190. And the fact that a man's family is settled in a certain place (though *prima facie* evidence that he is domiciled there, *Brewer v. Linnaeus*, 36 Me. 428) is consistent with his being domiciled elsewhere. *Greene v. Windham*, 13 Me. 225; *Cambridge v. Charlestown*, 13 Mass. 501; *Hairston v. Hairston*, 27 Miss. 704; *Pearce v. S.*, 1 Sneed. 63. — Ed.

<sup>2</sup> Only so much of the opinion as deals with the question of domicile is given. — Ed.

It is not pretended that she or her husband had abandoned their domicile in New York up to the time of his death in Europe in 1861; and from the evidence, which we have carefully examined, but do not consider it necessary to recite in detail, we are clearly of opinion that, up to the fall of 1868, she had not for a moment relinquished her intention and expectation, often declared orally, and in her written correspondence, of returning to her home in New York as soon as the condition of her health should permit; that her sojourn in Europe was compulsory, being caused by ill health and the advice of her physician that she was not physically able to bear the voyage and the excitement which would await her on her return; that she had not acquired any domicile abroad, and up to the time of the execution of the will in question, November 21, 1868, she continued to be a citizen of this State.

But it is claimed on the part of the contestants that although it should be conceded that she was a citizen of New York at that time, and then intended to return, she changed her intention, after executing the will, and acquired a domicile at Nice, and that this change destroyed the validity of the will, it not having been executed according to the laws of France. This is the only branch of the case which presents questions of difficulty.

The counsel for the contestants is sustained by authority in the position that the domicile of the testatrix at the time of her death, and not at the time of the execution of the will, is the material inquiry; and that as to personal property, the question of intestacy, or of the valid execution of her will, depends upon the law of the place where she was domiciled at the time of her death. This question was decided after much discussion, and notwithstanding the dissents of three eminent judges of this court, in the case of *Moultrie v. Hunt*, 23 N. Y. 394.

In England, the embarrassments likely to arise from such a rule are now obviated, as to British subjects, by the Act of Parliament of 24 and 25 Victoria, chapter 114, 1861-2, which provides in substance, as to wills made after the passage of the act, that wills of personal estate made out of the United Kingdom by a British subject shall be deemed well executed, whatever may be the domicile of the testator at the time of making the will, or of his death, if made according to the forms required by the law of the place where made, or of the place of the domicile of the testator at the time of making the will, or of the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin. Also, that no subsequent change of domicile shall affect the validity or construction of the will. This enactment substantially conforms the law of England to that which generally prevails in continental Europe. We have no such statute, and must therefore follow the rule laid down in *Moultrie v. Hunt*, and hold that if at the time of her death, January 8, 1871, Mrs. Wurtz had changed her domicile and ceased to be a citizen of

this State, her will is not valid here, unless it would be valid according to the law of the place of her domicile at the time of her death. (See also 1 Brad. 69; Story Conf. Laws, § 473.) The important question, therefore, is whether the evidence establishes such a change of the domicile of the testatrix as is alleged by the contestants.

A reference to some of the elementary principles governing questions of domicile will facilitate this inquiry.

One leading rule is that for the purposes of succession every person must have a domicile somewhere, and can have but one domicile, and that the domicile of origin is presumed to continue until a new one is acquired. (*Somerville v. Somerville*, 5 Ves. 750, 786, 787; Story, Conf. Laws, § 45; *Abington v. N. Bridgewater*, 23 Pick. 170; *Graham v. Pub. Admr.*, 4 Brad. 128; *De Bonneval v. De Bonneval*, 1 Curteis, 856; *Attorney-General v. Countess of Walsstatt*, 3 Hurl. & Colt. 374; *Aikman v. Aikman*, 3 McQueen, 855, 863, 877.)

The statute of New York of 1830, 2 Stat. at Large, p. 69, § 69*a*, referred to by the learned counsel for the contestants, does not affect this principle, nor does it aid in determining whether Mrs. Wurtz had lost her domicile or citizenship in New York.

The object and effect of this act are fully explained in *Matter of Catharine Roberts' Will*, 8 Paige, 525, 526; *Isham v. Gibbons*, 1 Bradf. 69; 4 Bradf. 128.

To effect a change of domicile for the purpose of succession there must be not only a change of residence, but an intention to abandon the former domicile, and acquire another as the sole domicile. There must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile. Residence alone has no effect *per se*, though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two taken together do constitute a change of domicile. (*Hodgson v. De Beauchesne*, 12 Moore P. C. Cases, 283, 328; *Munro v. Munro*, 7 Cl. & F. 877; *Collier v. Rivaz*, 2 Curteis, 857; *Aikman v. Aikman*, 3 McQueen, 855, 877.) This rule is laid down with great clearness in the case of *Moorhouse v. Lord*, 10 H. L. 283, 292, as follows: Change of residence alone, however long continued, does not effect a change of domicile as regulating the testamentary acts of the individual. It may be, and is, strong evidence of an intention to change the domicile. But unless in addition to residence there is an intention to change the domicile, no change of domicile is made. And in *Whicker v. Hume*, 7 H. L. 139, it is said the length of time is an ingredient in domicile. It is of little value if not united to intention, and is nothing if contradicted by intention. And in *Aikman v. Aikman*, 3 McQueen, 877, Lord Cranworth says, with great conciseness, that the rule of law is perfectly settled that every man's domicile of origin is presumed to continue until he has acquired another sole domicile with the intention of abandoning his domicile of origin;

that this change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts the change.

The question what shall be considered the domicile of a party, is in all cases rather a question of fact than of law. (*Bruce v. Bruce*, 6 Bro. Par. C. 566.) With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case, and each case must vary in its circumstances; and moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight. (12 Moore Priv. C. C. 330.)

In passing upon such a question, in view of the important results flowing from a change of domicile, the intention to make such a change should be established by very clear proof (*Donaldson v. McClure*, 20 Scotch Session Cases, 2d series, 321; S. C. aff'd, 3 McQueen, 852), especially when the change is to a foreign country. (*Moorhouse v. Lord*, 10 H. L. 283.)

The intention may be gathered both from acts and declarations. Acts are regarded as more important than declarations, and written declarations are usually more reliable than oral ones.

The principal if not the only act done by Mrs. Wurtz, in 1868, bearing upon the question of an intention to abandon her domicile in New York, consisted in her letting her house in Fifth Avenue to Mr. Gray in that year. This house she had kept unoccupied during all her stay abroad up to that time, and it is to be observed that in letting it to Mr. Gray, the testatrix reserved one room for the storage of some of her effects. In all other respects she continued to live after 1868, as she had done during the preceding nine years, dwelling all the time in hotels, passing her winters at Nice, and during the residue of the year travelling on the continent and in England. Nice had for many years been her headquarters. She there retained one room in the hotel for the storage of such personal effects as she did not desire to take with her upon her travels. The same reasons which had theretofore prevented her from returning to what she invariably called her home, still continued to exist. She had failed to recover the health of which she was in pursuit, and her physicians still continued to advise her that her health would not permit her to make the voyage home. But up to the time of her death she retained her property and investments in this State, made no investments abroad, did not purchase or even hire a permanent place of residence, and lived continually in hotels.

But after the execution of the will there was a change in the tenor of her correspondence, and in some of her oral declarations on the subject of returning to what she still continued to call her home, and it is upon these declarations that the contestants' case principally rests. In all her correspondence, up to the time of the making of the will, whenever the subject was alluded to, she had clearly exhib-

ited not only an intention, but a determination and expectation of returning as soon as her health should permit, and in many instances she had mentioned a definite period for the continuance of her sojourn abroad, and in others down to October, in 1868, she placed the continuance of her stay upon the ground that her physicians would not permit her to return.

On the 20th of April, 1868, she wrote to Mr. Seymour: "Dr. Pantaleone has told me very plainly that he cannot permit me to cross the Atlantic; that I have no strength to combat a voyage, and all the trials that are to meet me on my arrival. So here I am." On the 29th of September she again writes: "In fact with that and other troubles I have been ill, and have been put back three years in my convalescence. Now I never expect to be well." And on the 3d of October, 1868, she says to Mrs. Seymour: "But my nervous system has been shattered, and after the experience of the past year (in heavy trials) I see why my physicians have not wished me to go home. . . . Do you not think my articles ought to be in one place, except the silver?"

The first letter of all the series in evidence, bearing upon the question of an abandonment of the intention to return, was written on the 21st of November, 1868, the very day of the execution of the will. It is addressed to Mrs. Seymour. In it the testatrix says: "I am now in Dr. Pantaleone's care, and find all three physicians, Dr. Vallery in Rome, Dr. Mannoir in Geneva, and Dr. Pantaleone, agree that it is rest and tranquillity of mind is very important to me. Many thanks for your kind wishes. But except to see a few friends I have no inducement to return to America. My nerves would not endure the shock, and it is plain that my life is more quiet here. But I do not intend to expatriate myself, and hold firmly to my allegiance to my beloved country." In her will, bearing date the same day, she makes the following declaration: "As I have for several years resided in Europe, sojourning now at one place, and now at another, as my health and comfort have required, I deem it proper for me here to say, that I consider my home and residence as still being in the city of New York, in my beloved country, the United States of America." August 5th, 1869, from Geneva she writes to Mrs. Seymour as follows: "I think Charles is staying in Europe on my account, and I never expect to return. But I feel badly at any sacrifice for me. But Dr. Pantaleone is correct. Any moral excitement upsets me away from turbulent spirits, and there is much to worry me at home." And on the 13th of October, 1870, the last date of the series of letters in evidence, she writes to Mrs. Courtney: "I never can live in a cold climate again, and the few years I have to live, I want to live in comfort and repose."

These are all the written declarations of the testatrix bearing upon the question. There was also evidence of oral declarations, but they do not throw any additional light upon the intentions of the testatrix.

Mary Brown, a colored servant, who was in the service of the deceased during all her stay in Europe, testified that she always said, of late years, that she never would return to America. That the doctors told her she was not able to come, and, finally, she gave it up, and said she would not come. Mrs. Slemmer testified that, at Geneva, in the summer of 1870, Mrs. Wurtz said to her, "I know when I am well off, indeed I am not going back; I should never have any comfort if I did." She said she had no intention of returning, and had let her house and disposed of her furniture. Mr. Sandford testified that he had frequently spoken to her of her returning to America, and her reply invariably was that she could not come, that her health would not admit of it. Mr. Gray and Mr. Aldis testified substantially to the same effect.

This is, in substance, all the evidence in the case tending to show a change of domicile. The present is one of the exceptional cases in which the duty devolves upon this court to pass upon the facts as well as the law. And we think that the conclusion of fact, fairly to be drawn from all the evidence, is that the testatrix, after having long and consistently entertained the intention of returning, had finally become satisfied that the state of her health and nerves was such that she would be unable to return to her home, and would, in all probability, die abroad. At the same time it establishes no intention to adopt a foreign domicile, but that she desired and claimed to retain her domicile of origin, and to have her estate administered according to the laws of the State of New York. This, the learned counsel for the contestants contends, the law would not permit her to do. That her long-continued stay in Europe, in connection with her final abandonment of the idea of returning to New York: her dwelling, during the winter of each year, at Nice, furnishing, in part, the rooms which she occupied in the hotel; the removal to that place of a portion of her personal effects, her hiring an apartment in the hotel by the year for the storage of such articles as she did not carry with her on her summer travels, and always returning to the same place, afforded such clear evidence of the abandonment of her domicile in New York, and adoption of a new domicile at Nice, that no claim on her part to continue to be considered a citizen and resident of New York could preserve her domicile of origin; and he has cited numerous authorities in support of these positions.

An examination of these authorities will show that they proceed upon the ground that the person whose domicile was in question had actually settled in a new residence, with the intention of making it a permanent home; that this intention was manifested by unequivocal acts which outweighed any declarations to the contrary, and the intention was found as matter of fact.

The principal cases referred to in this connection are *Stanley v. Bernes*, 3 Hagg. Ecc. R. 373; *In re Steer*, 3 H. & N. 594; *Anderson v. Laneuville*, 9 Moore Priv. C. Cases, 325; *Hoskins v. Mat-*

thews, 35 Eng. L. & Eq. 540; Whicker v. Hume, 13 Beav. 384; 7 H. L. 124; Hegeman v. Fox, 31 Barb. 475; Ennis v. Smith, 14 How. U. S. 423.

In *Stanley v. Bernes*, the testator, a British subject, had been naturalized in Portugal, and the point decided was that a British subject might acquire a domicile abroad (a proposition which had been disputed, *Curling v. Thornton*, 2 Addams' R. 19), and that his claim to be considered a British subject did not destroy his foreign domicile. *In re Steer*, the testator had resided many years in Hamburg, and had been regularly constituted a burgher of that city to enable him to trade there. In his will, made while on a visit to England, he recited those facts, and his intention to return to Hamburg, and at the same time declared that he did not mean to renounce his domicile of origin as an Englishman. The court in that case conceded the principle of law that the domicile of origin continued until the testator had manifested an intention of abandoning it and acquiring another as his sole domicile, but held that there was evidence of such an intention, and decided, as matter of fact, that he had elected Hamburg as his domicile; that he thereby necessarily gave up his English domicile, as he could not retain both, and that the declaration in his will was unavailing. In *Anderson v. Laneville* the testator's domicile of origin was in Ireland. He had incontestably changed his domicile to England. He afterwards broke up his establishment in England and moved to France, where he bought and furnished a house, in which he resided permanently for thirteen years. The contest was between his English and French domicile, and was decided as a question of fact. In *Hoskins v. Matthews*, the decedent was held to have acquired a domicile in Tuscany by residence, the purchase of a villa and the establishment of his family there. Notwithstanding his continued attachment for his native country, and his often expressed desire to return there, and the fact that he was obliged, by his health, to live in a milder climate than that of his birth, the fact being established that he had formed the intention of permanently changing his domicile, the court held that the change was not the less effectual because induced by motives of health: at the same time admitting that even a permanent residence in a foreign country, occasioned by the state of health, may not operate as a change of the domicile, and that every case must stand upon its own circumstances.

In *Whicker v. Hume*, 13 Beav. 384, and 7 H. L. 124, the domicile of origin of the testator was in Scotland. The evidence of an abandonment of that domicile, and the adoption of a domicile in England was clear. Afterward he went to France, leaving some of his property in England, which he desired a friend to keep for him until his return. He died in Paris, having just made a will in the English form, which was sustained.

The Scotch domicile was regarded as entirely out of the question, and the contest was between the English and French domicile. (7 H. L. 139.)

In *Hegeman v. Fox*, much relied upon by the contestants, the question was whether the testator was at the time of his death domiciled in Florida. He was a native of Massachusetts, had been domiciled in New York, afterward in Williamsburgh, and then removed to Florida. There was no evidence of any intention to retain his domicile in Williamsburgh, and the opinion of the court was that the weight of the evidence established that he neither expected nor intended to return to the Northern States. He purchased a plantation in Florida, stocked it, and furnished his house, went to housekeeping, entered into the business of planting, and made other family arrangements looking to a permanent residence there. Upon these facts it was held that the circumstances that this change of residence was induced by considerations of climate and health, and that domestic troubles intervening induced the expression of an intention to return to New York, did not overcome the effect of his acts, which clearly indicated an intention to make his permanent home in Florida. The case is well reasoned in the opinion of the court, and does not conflict in principle with the result at which we have arrived, but depends upon its own peculiar circumstances.

In *Ennis v. Smith* the question was whether General Kosciusko had acquired a domicile in France. He left Poland voluntarily, came to this country, and afterward went voluntarily to France, where he lived for fifteen years. He could have returned to Poland at any time. He was made a French citizen by decree of the national assembly, of which privilege he could not avail himself unless he became domiciled in France. Residence was, in that case, said to be *prima facie* evidence of domicile, and the facts were held to establish a domicile in France.

In all these cases it was upon the ground of a clearly proved voluntary and intentional acquisition of a foreign domicile that the courts held the former domicile abandoned.

The late cases of *Jopp v. Wood*, [1864] 34 L. J. Eq. 212, and *Moorhouse v. Lord*, 10 H. L. 284, proceed upon the ground that in order to acquire a new domicile there must be an intention to abandon the existing domicile. All the authorities agree that to effect a change of domicile there must be an intention to do both. Some of them hold that the intention to do one implies an intention to do the other. But in all the cases the question of intention is treated as one of fact, to be determined according to the particular circumstances of each case. (See also *Douglas v. Douglas*, Law Rep. 12 Eq. 617, 647; *The Attorney-General v. The Countess de Wahlstatt*, 3 Hurl. & Colt. 374; *Udny v. Udny*, L. R. 1 Scotch App. 441, 1070; *White v. Brown*, 1 Wallace, Jr. 217.)

In the present case we find no sufficient evidence of an intention to adopt Nice or any other place as a permanent home or domicile. The plans of the testatrix after November, 1868, so far as disclosed, had reference to failing health and an apprehension that she might not



long survive, rather than to adopting and settling in a new home. If she chose to be a wanderer during the short period of life which she supposed might still remain to her, she would not thereby, as respects her succession, lose her domicile of origin. (*Attorney-General v. Countess of Walsstatt*, 3 H. & C. 374; *White v. Brown*, 1 Wall., Jr. 217.)

Her long residence abroad, upon which the contestants rely, is not very significant in this case, as during by far the greater part of that time, in fact during all except about two and a quarter years before her death, she was clearly shown to be a mere sojourner in Europe, intending and fully expecting to return, and retaining her house in New York; and all the acts relied upon to show the acquisition of a domicile in Nice were done during that period, and while there can be no doubt of her continuing to be a citizen of New York. Her habit of spending her winters in Nice, her furnishing her rooms, hiring a store-room at the hotel, the bringing out there of her nick-nacks as they are called, were all before she had given any evidence of the relinquishment of her plan of return, and while she still retained her house in Fifth Avenue, New York. The only evidence of any change consists in her declarations. These indicate no intention to settle permanently in any particular place, and are clearly contradictory of any intention to abandon her domicile in New York. A mere declaration of intention not to return is not conclusive as to a change of domicile. As well expressed by Lord Kingsdown in *Moorhouse v. Lord*, 10 H. L. 293: "I can well imagine a case in which a man leaves England with no intention whatever of returning, but with a determination and certainty that he will not return." He then supposes the case of one laboring under a mortal disease, whose physician advises him that his life may be prolonged or his sufferings mitigated by a change to a warmer climate, and says that to hold that he cannot do that without losing his right to the intervention of the English laws as to the transmission of his property after his death, would be revolting to common sense and the common feelings of humanity. (See S. C. p. 283, per Lord Cranworth; *Story Conf. Laws*, §§ 45, 46; *Guthrie's Savigny*, 62, 63; *Munro v. Munro*, 7 Cl. & Fin. 842, 876; 1 Rob. Ecc. R. 606; 2 Hurl. & Colt. 982; 3 id. 374.)

Unless a new domicile was acquired, as has been already shown, the domicile of origin continues, and must govern, else there would be no law according to which the estate could be administered, especially in a case of intestacy.<sup>1</sup>

<sup>1</sup> *Acc. Moorhouse v. Lord*, 10 H. L. C. 272. See *Johnstone v. Beattie*, 10 Cl. & F. 42. So domicile is not necessarily changed by an absence, however long continued, for pleasure, travel, etc.: *Culbertson v. Floyd County*, 52 Ind. 361; *Sears v. Boston*, 1 Met. 259; *Cadwalader v. Howell*, 18 N. J. L. 138. Nor by absence merely for business: *Easterly v. Goodwin*, 35 Conn. 279; *Greene v. Greene*, 11 Pick. 410; *Hallet v. Bassett*, 100 Mass. 167; *S. v. Dayton*, 77 Mo. 678; see *Jopp v. Wood*, 34 Beav. 88. Nor by

## HARRAL v. HARRAL.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1884.

[Reported 39 New Jersey Equity, 279.]

DEPUE, J.<sup>1</sup> The domicile of the testator's parents, at the time of his birth, was in Bridgeport, Connecticut. That was his domicile of origin. His father died in 1862. In 1865 the family residence in Bridgeport was sold, and in 1866 his mother removed to New York with all the family, except one son, who was married, and had his household in Bridgeport. The mother rented a house in New York as a residence for herself and the family, which they occupied until her death in December, 1867. After his mother's death, the testator resided in New York City with his brother, until he was appointed house-surgeon in the New York Hospital, and had his residence in the hospital until he went to Europe in August, 1869.

The decedent went abroad for the purpose of acquiring the German language and continuing his professional studies. In 1869 he was in Paris temporarily, and in the fall of that year left Paris for Germany, where he remained about two years. He then went to Paris again, and resided there in No. 8 Rue de la Sorbonne, known as the Latin Quarter. In 1872, he became acquainted with the complainant, who lived with him as his mistress at No. 8 Rue de la Sorbonne until they were married on the 20th of February, 1877. Immediately after their marriage they began housekeeping in a house rented by him at Suresnes, a village a short distance from Paris. He had a lease of the house for two years, and he and his wife continued to occupy it until his return to America, in May, 1878. He seems to have been attached to his wife. In May, 1877, he wrote to Mr. Wallis, announcing his marriage, and said he was "happy and contented." The facts connected with the residence of the decedent at Suresnes are fully stated in the opinion of the chancellor, and need not be repeated here. The chancellor, from the testimony, concluded that the decedent had settled himself in France to live there, and make it his home. The circumstances under which he was brought to America are also detailed in the chancellor's opinion. They show no intention on the part of the decedent to make any change at that time in his domicile. The evidence is quite to the contrary.

A person *sui juris* may change his domicile as often as he pleases. To effect such a change, naturalization in the country he adopts as his

absence as a volunteer soldier : *S. v. Judge*, 13 Ala. 805 ; *Brewer v. Linnaeus*, 36 Me. 428. Nor by absence to hold public office : *Dennis v. S.*, 17 Fla. 389 ; *Walden v. Canfield*, 2 Rob. (La.) 466 ; *Venable v. Paulding*, 19 Minn. 488 ; *Hannon v. Grizzard*, 89 N. C. 115. But in cases of this kind the domicile will of course be changed if the requisite intent exists. *Doucet v. Geoghegan*, 9 Ch. Div. 441 ; *Moor v. Harvey*, 128 Mass. 219 ; *Wood v. Fitzgerald*, 3 Or. 568. — Ed.

<sup>1</sup> Only so much of the opinion as discusses the question of domicile is given. — Ed

domicile is not essential. He need not do all that is necessary to divest himself of his original nationality. There must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the *factum* of residence there must be added the *animus manendi*; and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home. *Haldane v. Eckford*, L. R. 8 Eq. 631; *King v. Foxwell*, L. R. 3 Ch. D. 518; *Lord v. Colvin*, 5 Jur. (N. S.) 351; *Aikman v. Aikman*, 7 Id. 1017, 1019; *Douglas v. Douglas*, L. R. 12 Eq. 617, 644; *Udny v. Udny*, L. R. 1 H. L. Sc. 441; *Cadwalader v. Howell*, 3 Harr. 144, 145.

We think the evidence proves that the testator's domicile, arising from the *factum* of residence and the *animus manendi*, was, at the time of his death, by the *jus gentium*, in France.

But it is contended that, inasmuch as the decedent never obtained an authorization from the French government, he was incapable, by the law of that country, of acquiring a domicile in France, and that therefore his domicile of origin, or his domicile before he took up his residence in France, either revived, or, by the French law, would govern, in the disposition of his personal estate if it was administered upon in France. Article XIII. of the Code Napoleon is relied on to sustain this contention. That article is in these words: "The foreigner who shall have been admitted by the government to establish his domicile in France shall enjoy in that country all civil rights so long as he shall continue to reside there."

It appears from the evidence that the authorization contemplated by this article of the Code is obtained by an application to the head of the government, and is attended with formalities almost as solemn as those required for naturalization in France.

The construction of this article was before the English courts in *Bremer v. Freeman*, 10 Moore P. C. 306, and *Hamilton v. Dallas*, L. R. 1 Ch. D. 257, and was somewhat considered in the New York Court of Appeals in *Dupuy v. Wurtz*, 53 N. Y. 556. In *Bremer v. Freeman* it was held that, if by the *jus gentium* the decedent, who was an English woman by birth, was *de facto* domiciled in France, the authorization of the French government was not necessary to confer upon her the right of testacy, and that her will, not executed in conformity with the French law, was invalid. In *Hamilton v. Dallas*, Vice-Chancellor Bacon held that a *de facto* domicile, governing the succession of the personal estate of a decedent, might be acquired by a foreigner resident in that country who had not obtained the government authorization required by Article XIII. of the French Code, as the condition for the enjoyment by a foreigner resident in that country of full civil rights. The learned judge who prepared the opinion in *Dupuy v. Wurtz* expressed a contrary opinion, but the case did not call

for a decision on that point. The counsel of the defendants have produced several decisions of the French courts which hold that, in cases of intestacy, the inheritance of a foreigner domiciled *de facto* in France will not be distributed under the French law unless he shall have obtained the authorization required by Article XIII. of the Code. Pepin's Case, decided in 1868; Melizet's Case, decided January, 1869; Ott's Case, decided January, 1869; Forgo's Case, decided in 1875; and Cuirana's Case, decided in 1881. It will be observed that all these cases relate to the transmission of property by inheritance, or by testamentary disposition. They do not touch the question in controversy in this case. The complainant does not claim the property in dispute by any right of succession, nor does she dispute the validity of the testator's will, as not being executed according to the laws of France. The claim she makes to the one half of the personal property of her deceased husband she founds upon the marriage in France, and the incidents of the married relation, in virtue of which she claims that, by the French law, she became thereby *ipso facto* entitled to that share in his movable property.

The French jurists recognize a distinction between such a legal domicile as a foreigner can acquire by fulfilling the requirements of Article XIII. of the Code, and will entitle him to all the civil rights of native-born Frenchmen, and a domicile, in fact, which is acquired by a residence without compliance with any legal formalities. The right of a foreigner to contract a lawful marriage is not made to depend on the observance of such forms as are necessary to the acquisition of citizenship; it is given on the sole condition of six months' residence by either of the parties. Article LXXIV. of the Code provides that "the marriage shall be celebrated in the commune in which the one or the other of the parties shall be domiciled," and declares that "this domicile shall be established by six months' continued habitation within the same commune." These conditions were fulfilled, and the marriage was lawfully celebrated under the French law.<sup>1</sup>

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### BORLAND v. BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1882.

[Reported 132 Massachusetts, 89.]

LORD, J.<sup>2</sup> The evidence tended to show that the plaintiff was born in Boston in 1824, and had lived there until June, 1876, when he sailed for Europe with his family. He testified that when he left Boston he had definitely formed the intention of not returning to Boston as a resident; that in the fall of 1876 he had decided to make Waterford,

<sup>1</sup> *Acc. Collier v. Rivaz*, 2 Curt. Eccl. 855. — ED.

<sup>2</sup> Part of the opinion, dealing with a different question, is omitted. — ED.

Connecticut, his residence, and then formed the intention of purchasing land there, which he bought on May 28, 1877; and that he remained in Europe until 1879, when he returned to this country, and went to Waterford. On this evidence, the judge instructed the jury, "that a citizen, by the laws of this Commonwealth, must have a home or domicile somewhere on the first day of May for the purpose of taxation; that in order to change such home or domicile, once acquired, and acquire a new one, the intention to make the change and the fact must concur; that if the plaintiff, with no definite plan as to the length of time he should remain abroad, and no definite purpose about a change of domicile, went to Europe with his family, that would not effect a change of his domicile from Boston, and he would remain liable to taxation there; but that if he left Boston in 1876 with his family to reside in Europe for an indefinite length of time, with the fixed purpose never to return to Boston again as a place of residence, and with the fixed purpose of making some place other than Boston his residence whenever he should return to the United States, and had in his mind fixed upon such place of residence before May 1. 1877, and remained in Europe until after that time, he was not liable to this tax as an inhabitant of Boston on the first of May of that year; that whether he had done enough to make Waterford his home or not, was not essential in this case, — if he had lost his home in or ceased to be an inhabitant of Boston at the time, he was not taxable there."

Certainly, the latter part of this instruction would be understood to be in conflict with the former; for, not referring now to the words used by the judge, the obvious meaning of the whole sentence is, first, to instruct the jury that a man once having a home here is taxable here until both the purpose to change his home and the fact of changing his home concur; and afterwards to instruct them that, if his intention to make another place his home is formed after he leaves this country, and before the first of May, such intention removes his liability to taxation, even although the fact of change does not concur with the intention. Although there is this obvious inconsistency, it arises partly from inherent difficulties in the case, partly from the impossibility of stating a fixed rule which shall be applicable to all cases, under the infinite variety of circumstances attending them, and the various adjudications which have been made upon the subject. The source of the difficulty is in the use of words of exactly, or substantially, or partially, the same signification, but at different times used with different significations.

There are certain words which have fixed and definite significations. "Domicile" is one such word; and for the ordinary purposes of citizenship, there are rules of general, if not universal acceptance, applicable to it. "Citizenship," "habitaney," and "residence" are severally words which may in the particular case mean precisely the same as "domicile," but very frequently they may have other and

inconsistent meanings; and while in one use of language the expressions a change of domicile, of citizenship, of habitancy, of residence, are necessarily identical or synonymous, in a different use of language they import different ideas. The statutes of this Commonwealth render liable to taxation in a particular municipality those who are inhabitants of that municipality on the first day of May of the year. Gen. Sts. c. 11, §§ 6, 12. It becomes important, therefore, to determine who are inhabitants, and what constitutes habitancy.

The only case adjudged within this Commonwealth, in which the word of the statute, "inhabitant," is construed to mean something else than "being domiciled in," is *Briggs v. Rochester*, 16 Gray, 337, although that decision is subsequently recognized in *Colton v. Longmeadow*, 12 Allen, 598. In *Briggs v. Rochester*, Mr. Justice Metcalf, in speaking of the word "inhabitant," says that it has not the meaning of the word "domicile" "in its strictly technical sense, and with its legal incidents." He says also that the word "domicile" is not in the Constitution nor in the statutes of the Commonwealth. So far as the Constitution is concerned, this is correct, but he had evidently overlooked a statute of ten years before, in which the word "domicile" was used, and upon the very subject of taxation, in a proviso in these words: "Provided that nothing herein contained shall exempt said person from his liability to the payment of any tax legally assessed upon him in the town of his legal domicile." St. 1850, c. 276. Gen. Sts. c. 11, § 7. This language is a strong legislative assertion that domicile is the test of liability to taxation; and in an opinion given by the justices of this court to the House of Representatives in 1813, in reference to a student's right to vote in the municipality in which he is residing for the purposes of education, it was said, "And as liability to taxation for personal property depends on domicile." 5 Met. 587, 590.

Nor do we think that the opinion in *Briggs v. Rochester* gives the true force as used in the Constitution of the word "inhabitant;" for we cannot doubt that for the purposes of taxation the word "inhabitant" must be used in the same sense as when used in reference to electing and being elected to office; especially as at that time the payment of a tax duly assessed was one of the qualifications of an elector; and more especially as the Constitution itself professes to give its definition of "inhabitant" for the purpose of removing all doubt as to its meaning. Its language is, "And to remove all doubts concerning the meaning of the word 'inhabitant' in this Constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this State, in that town, district, or plantation, where he dwelleth, or hath his home." Const. Mass. c. 1, § 2, art. 2.

Nor do we see how the construction given to the statute is consistent with the result at which the court arrived. The learned judge

says, "In the statute on which this case depends, we are of opinion that the words 'where he shall be an inhabitant on the first day of May,' mean where he shall have his home on that day." It is therefore clear that the learned judge does not give to the word "inhabitant" the meaning which the construction of the statute before referred to authorizes him to give, but he does give the exact definition of the Constitution, to wit, "where he dwelleth, or hath his home;" for these words have not in the Constitution two meanings, but the single signification given to them by the learned judge, "his home," the exact, strict, technical definition of domicile.

We cannot construe the statute to mean anything else than "being domiciled in." A man need not be a resident anywhere. He must have a domicile. He cannot abandon, surrender, or lose his domicile, until another is acquired. A cosmopolite, or a wanderer up and down the earth, has no residence, though he must have a domicile. It surely was not the purpose of the Legislature to allow a man to abandon his home, go into another State, and then return to this Commonwealth, reside in different towns, board in different houses, public or private, with no intention of making any place a place of residence or home, and thus avoid taxation. Such a construction of the law would create at once a large migratory population.

Although we have said that the case of *Briggs v. Rochester* has been recognized in *Colton v. Longmeadow*, 12 Allen, 598, yet we ought to state that the decision in *Colton v. Longmeadow* was placed upon entirely different grounds. It was there held that the plaintiff had lost his domicile in Massachusetts because he had actually left the Commonwealth, and was actually *in itinere* to his new domicile, which he had left this Commonwealth for the purpose of obtaining, and which in fact he did obtain. If it should be deemed sound to hold that a person, who, before the first of May, with an intention in good faith to leave this State as a residence and to adopt as his home or domicile another place, is in good faith and with reasonable diligence pursuing his way to that place, is not taxable here upon the first of May, the doctrine should be limited strictly to cases falling within these facts. And both of the cases cited, *Briggs v. Rochester* and *Colton v. Longmeadow*, would fall within the rule. In each of those cases, the plaintiff had determined, before starting upon his removal, not only upon his removal, but upon his exact destination, and in fact established himself, according to his purpose, without delay, and within a reasonable time.

We think, however, that the sounder and wiser rule is to make taxation dependent upon domicile. Perhaps the most important reason for this rule is, that it makes the standard certain. Another reason is, that it is according to the general views and traditions of our people.

One cannot but be impressed by certain peculiarities in *Briggs v. Rochester*. The bill of exceptions in that case begins thus: "It

was admitted by both parties and so presented to the jury, that the only question at issue was the domicile of the plaintiff on the first of May, 1858; and that if he was then an inhabitant of the defendant town, the tax was rightly imposed; but that if he was not on that day an inhabitant of said town, he was not then rightly taxable and taxed therein." Nothing can be more clear than that all parties understood, and the case was tried upon the understanding, that domicile and inhabitancy meant the same thing; otherwise, domicile, instead of being "the only question at issue," would not have been in issue at all. And the judge in giving his opinion says that, if domicile in its strictly technical sense, and with its legal incidents, was the controlling fact, the plaintiff was rightly taxed in Rochester.

Another noticeable fact in *Briggs v. Rochester* is this, that if the tax-payer in the pursuit of his purpose is beyond the line of the State before the first of May, he is not liable to taxation in the State; but if by detention he does not cross the line of the State till the first of May, he is taxable here. We cannot adopt a rule which shall make liability to taxation depend upon proximity to a State line.

We have said that we prefer the test of domicile, because of its certainty and because of its conformity to the views and traditions of our people, and, we may add, more in accordance with the various adjudications upon the subject in this State, and more in accord with the general legal and judicial current of thought. It is true, that, as said by Mr. Justice Metcalf, "it has repeatedly been said by this and other courts, that the terms 'domicile,' 'inhabitancy,' and 'residence' have not precisely the same meaning." But it will be found upon examination that these three words are often used as substantially signifying the same thing.

In one of the earliest cases, *Harvard College v. Gore*, 5 Pick. 370, 377, Chief Justice Parker, in defining the word "inhabitant" as used in the laws, defined it as one which imported not only domicile, but something more than domicile. "It imports citizenship and municipal relations, whereas a man may have a domicile in a country to which he is an alien, and where he has no political relations. . . . An inhabitant, by our Constitution and laws, is one who being a citizen dwells or has his home in some particular town, where he has municipal rights and duties, and is subject to particular burdens; and this habitancy may exist or continue notwithstanding an actual residence in another town or another country." There are other passages in the same opinion which, although used *alio intuitu*, yet clearly indicate the current of judicial thought; for example, "The term 'inhabitant' imports many privileges and duties which aliens cannot enjoy or be subject to," p. 373; "does not fix his domicile or habitancy," p. 372; "a pretended change of domicile to avoid his taxes," p. 378. There are other similar expressions running through the whole opinion.

In *Lyman v. Fiske*, 17 Pick. 231, the views of Chief Justice Parker



in *Harvard College v. Gore* were considered by Chief Justice Shaw; and although expressing no dissent from the views of Chief Justice Parker, it is evident that in his apprehension the word "inhabitant" as used in the Constitution imported one domiciled, and he did not deem it important to consider whether it imported anything else in relation to political rights, duties, and liabilities than the word "domiciled" would import. But as the views of that magistrate are never to be slightly regarded, and as he gave the opinion in both the cases decided by this court, cited by Mr. Justice Metcalf as settling that the words "domicile," "habitaney," and "residence" have not precisely the same meaning, we cite from his opinion to show what his views were of "domicile" and "habitaney." "In some respects, perhaps, there is a distinction between habitaney and domicile, as pointed out in the case of *Harvard College v. Gore*, 5 Pick. 377, the former being held to include citizenship and municipal relations. But this distinction is believed to be of no importance in the present case; because all the facts and circumstances which would tend to fix the domicile would alike tend to establish the habitaney. It is difficult to give an exact definition of 'habitaney.' In general terms, one may be designated as an inhabitant of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct."

It is entirely clear that in his opinion, so far as relates to municipal rights, privileges, and duties, there is substantially no distinction between "domicile" and "habitaney." And, as further illustrating the views of that magistrate and the general sentiment of our people as to the use of such language in legislative enactments, we cite his language in *Abington v. North Bridgewater*, 23 Pick. 170, 176: "In the several provincial statutes of 1692, 1701, and 1767, upon this subject, the terms 'coming to sojourn or dwell,' 'being an inhabitant,' 'residing and continuing one's residence,' 'coming to reside and dwell,' are frequently and variously used, and, we think, they are used indiscriminately, and all mean the same thing, namely, to designate the place of a person's domicile. This is defined in the Constitution, c. 1, § 2, for another purpose, to be the place 'where one dwelleth, or hath his home.'"

Authorities could be multiplied almost indefinitely in which it has been held by this court that, so far as it relates to municipal rights, privileges, powers or duties, the word "inhabitant" is, with the exceptions before referred to, universally used as signifying precisely the same as one domiciled. See *Thorndike v. Boston*, 1 Met. 242, 245; *Sears v. Boston*, 1 Met. 250, 252; *Blanchard v. Stearns*, 5 Met. 298, 304; *Otis v. Boston*, 12 Cush. 44, 49; *Bulkley v. Williamstown*, 3 Gray, 493, 494.

As illustrative, however, of the fact that domicile and habitancy are, for the ordinary purposes of citizenship, such as voting, liability to taxation and the like, identical, and that when they are susceptible of different meanings they are used *alio intuitu*, we cite the language of Chief Justice Shaw in *Otis v. Boston*, 12 Cush. 44, 49: "Perhaps this question has heretofore been somewhat complicated, by going into the niceties and peculiarities of the law of domicile, taken in all its aspects; and there probably may be cases where the law of domicile, connected with the subject of allegiance, and affecting one's national character, in regard to amity, hostility, and neutrality, is not applicable to this subject. But as a man is properly said to be an inhabitant where he dwelleth and hath his home, and is declared to be so by the Constitution, for the purpose of voting and being voted for; and as one dwelleth and hath his home, as the name imports, where he has his domicile, most of the rules of the law of domicile apply to the question, where one is an inhabitant."

A very strong case of retention of domicile, while *in itinere* to a new one which is subsequently reached, is *Shaw v. Shaw*, 98 Mass. 158, in which the court say that the rule of *Colton v. Longmeadow*, which merely followed *Briggs v. Rochester*, "is such an exception to the ordinary rule of construction as ought not to be extended."

Upon the whole, therefore, we can have no doubt that the word "inhabitant" as used in our statutes when referring to liability to taxation, by an overwhelming preponderance of authority, means "one domiciled." While there must be inherent difficulties in the decisiveness of proofs of domicile, the test itself is a certain one; and inasmuch as every person by universal accord must have a domicile, either of birth or acquired, and can have but one, in the present state of society it would seem that not only would less wrong be done, but less inconvenience would be experienced, by making domicile the test of liability to taxation, than by the attempt to fix some other necessarily more doubtful criterion.

Whether the cases of *Briggs v. Rochester* and *Colton v. Longmeadow* should be followed in cases presenting precisely similar circumstances, the case at bar does not require us to decide; and we reserve further expression of opinion on that question until it shall become necessary for actual adjudication. If they are to be deemed authority, they should certainly be limited to the exact facts, where a person before leaving this Commonwealth has fixed upon a place certain as his future home, and has determined to abandon this Commonwealth for the purpose of settling in his new home, and is, upon the first of May, without the Commonwealth, in good faith and with reasonable despatch actually upon his way to his new home. The plaintiff does not bring himself within this rule; for although he might have left the Commonwealth with the fixed purpose to abandon it as a residence, he did not leave it on his way to a place certain which he had determined upon as his future residence, and was pro-

ceeding to with due despatch; and, upon the general rule that, having had a domicile in this Commonwealth, he remains an inhabitant for the purpose of taxation until he has acquired a new domicile, the intention and fact had not concurred at the time when this tax was assessed. The instructions of the presiding judge, therefore, inasmuch as they were not based upon the rules here laid down, were not accurately fitted to the facts of the case, and the

*Exceptions must be sustained.*<sup>1</sup>

### YOUNG v. POLLAK.

SUPREME COURT OF ALABAMA. 1888.

[Reported 85 Alabama, 439.]

THE plaintiffs were merchants in the city of Montgomery, suing on common counts for goods sold and delivered to Mrs. Effie Young, the defendant, who was a married woman. The defendant pleaded the general issue, and a special plea averring her coverture; the plaintiffs replied, alleging that her husband had abandoned her, and had removed from the State, and thereafter the defendant carried on business on her own account and in her own name, as if sole and unmarried.<sup>2</sup>

STONE, C. J. The fourth charge given at the request of plaintiffs in each of these cases is in the following language: "If W. L. Young, husband of defendant, removed into the State of Alabama as a place of refuge, or to escape arrest in the State of Georgia, and that was his sole purpose, this would not give him a domicile in Alabama." Change of domicile consists of an act done, with an intent. The act is an actual change of residence. The intent, to effect the change, must be to acquire a new domicile, either permanent in purpose, or of indefinite duration. A temporary habitation, without intent to make it a permanent home, or one of indefinite duration, is not a change of domicile. *Merrill v. Morrisset*, 76 Ala. 433; 5 Amer. & Eng. Encyc. of Law, 863.

The charge copied hinges the question of Young's change of domicile on the purpose with which he moved from Georgia to Alabama. Men change their domiciles with very varying purposes or motives. The desire to live in a healthier region, to have better social or educational advantages, to enjoy better church privileges, to be near one's relatives, to live in a new and growing country, and sometimes to be

<sup>1</sup> *Acc.* *Pfoutz v. Comford*, 36 Pa. 420. No change of domicile takes place while one is *in itinere* to a new domicile: *Lamar v. Mahony*, Dudley, 92; *Littlefield v. Brooks*, 50 Me. 475; *Bulkley v. Williamstown*, 3 Gray, 493; *Shaw v. Shaw*, 98 Mass. 158. — Ed.

<sup>2</sup> This statement, containing all the facts necessary to understand the question of domicile raised, is substituted for the statement of the reporter. Part of the opinion is omitted. — Ed.

relieved of disagreeable surroundings, — these and many more may be classed among the purposes — sole purposes, if you please — with which men change their residence. Yet, if the change be in fact made with the intent to acquire a new residence, either permanent or of indefinite duration, this is a change of domicile. The intent that the new habitation shall, or shall not be, permanent, or of indefinite duration, and not the purpose in making the change, is the pivot on which the inquiry turns. The city court erred in giving this charge.

The second charge at the instance of plaintiffs in each of these cases needs modification. If Young, under the rules declared above, became a resident of Alabama, then his return to Georgia under arrest, or involuntary confinement there, are, of themselves, no evidence of a change of domicile.<sup>1</sup>

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### DITSON v. DITSON.

SUPREME COURT OF RHODE ISLAND. 1856.

[*Reported 4 Rhode Island, 87.*]

AMES, C. J.<sup>2</sup> Although, as a general doctrine, the domicile of the husband is, by law, that of the wife, yet, when he commits an offence, or is guilty of such dereliction of duty in the relation as entitles her to have it either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicile of her own! This she may establish, nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish, in a different judicial or State jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicile of her own; and especially if a native of the State to which she flies for refuge, is, upon familiar principles, readily reintegrated in her old domicile. This is the well-settled doctrine of law upon the subject (Bishop on Marriage and Divorce, §§ 728–730 incl. and cases cited), and has by no court been more ably vindicated than by the Supreme Court of Massachusetts. *Harteau v. Harteau*, 14 Pick. 181, 186.

A more proper case for the application in favor of a petitioner for divorce of the foregoing principles relating to the jurisdiction of the

<sup>1</sup> One confined in prison does not become domiciled in the prison. *Grant v. Dalliber*, 11 Conn. 234; *Barton v. Barton*, 74 Ga. 761. So one forcibly removed from his home by military authorities does not lose his domicile. *Hardy v. De Leon*, 5 Tex. 211.

Paupers in a poorhouse do not acquire a domicile there. *Clark v. Robinson*, 88 Ill. 498. *Contra*, *Sturgeon v. Korte*, 34 Ohio St. 525.

Political refugees do not ordinarily relinquish their domicile. *De Bonneval v. De Bonneval*, 1 Curt. Eccl. 856; *Ennis v. Smith*, 14 How. 400 (*semble*); but see *S. v. De Casinova*, 1 Tex. 401. — Ed.

<sup>2</sup> Part of the opinion only, involving the question of domicile, is given. — Ed.

court over her case, and to the question of her domicile in this State, can hardly be imagined, than the case at bar. The petitioner is the daughter of a native of this State, who, though formerly resident in Boston, has for many years past been domiciled in his native place, Little Compton. Whilst at school, the petitioner became acquainted with an Englishman of the name of Ditson, and, in 1842, married him, without the knowledge or consent of her parents, in New York. Immediately after marriage the couple went to Europe, and from thence to Cuba, where they lived together several years. Upon their return to this country, she being in a feeble and emaciated condition, he deserted her for the first time in Boston, and was absent in Europe, without leaving any provision for her, for about two years. Upon his return, they appear to have lived together again; he, however, giving every indication of a morose as well as inattentive husband. After a short time, he deserted her again in Boston, declaring, upon his leaving it for Europe, that he cared nothing about it, or any person in it, pointing, as the testimony is put to us, to his unfortunate wife. He has been absent from her now between three and four years, without communicating with her, or providing, though of sufficient ability, anything for her support, nor does she know where he is, except that he has gone to Europe. In the mean time, deserted as she was, she was obliged to return to her father's house in Little Compton; where, during this time, supported by him or by her own exertions, she has resided, with the exception of about three months passed by her in Newport, Rhode Island. For this desertion and neglect to provide for her, the proof, *ex parte* it is true, but coming from respectable sources, finds no excuse in her conduct, which, according to it, has always, so far as known, been that of a dutiful and faithful wife. . . . Whatever was the former domicile of the petitioner, we are satisfied that she is, and has, for upwards of the last three years, been a domiciled citizen of Rhode Island, — her only home, in the house of her father.<sup>1</sup>

<sup>1</sup> "The law will recognize a wife, as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home, bed and board being put, a part for the whole, as expressive of the idea of *home*. Otherwise, the parties in this respect would stand upon very unequal grounds, it being in the power of the husband to change his domicile at will, but not in that of the wife. The husband might deprive the wife of the means of enforcing her rights, and in effect of the rights themselves, and of the protection of the laws of the Commonwealth, at the same time that his own misconduct gives her a right to be rescued from his power on account of his own misconduct towards her." SHAW, C. J., in *Harteau v. Harteau*, 14 Pick. 181. "She may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues." SWAYNE, J., in *Cheever v. Wilson*, 9 Wall. 108. *Acc.* *Hanbury v. Hanbury*, 20 Ala. 629; *Chapman v. Chapman*, 129 Ill. 386; *Hunt v. Hunt*, 72 N. Y. 217. *Contra*, *Yelverton v. Yelverton*, 1 Sw. & Tr. 574; *Maguire v. Maguire*, 7 Dana, 181; and see *Hinds v. Hinds*, 1 Ia. 36. In some jurisdictions it is held that if a wife is living apart from her husband for cause, she *must*, for purposes of divorce, have a

## LAMAR v. MICOU.

SUPREME COURT OF THE UNITED STATES. 1834.

[Reported 112 *United States*, 452.]

THIS is an appeal by the executor of a guardian (Lamar) from a decree of the Circuit Court of the United States for the Southern District of New York, in favor of the plaintiff, the administratrix of his ward. The bill prayed for an account of the ward's estate. The guardian alleged that the property had been lost through unfortunate investments: and the question was whether the law which governed the duties of the guardian permitted such investments.<sup>1</sup>

GRAY, J. An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicile, change the domicile of the infants: the domicile of the children, in either case, following the independent domicile of their parent. *Kennedy v. Ryall*, 67 N. Y. 379; *Pottinger v. Wightman*, 3 Meriv. 67; *Dedham v. Natick*, 16 Mass. 135; *Dacey on Domicile*, 97-99. But when the widow, by marrying again, acquires the domicile of a second husband, she does not, by taking her children by the first husband to live with her there, make the domicile which she derives from her second husband their domicile; and they retain the domicile which they had, before her second marriage, acquired from her or from their father. *Cumner v. Milton*, 3 Salk. 259; s. c. *Holt*, 578; *Freetown v. Taunton*, 16 Mass. 52; *School Directors v. James*, 2 Watts & Sergeant, 568; *Johnson v. Copeland*, 35 Alabama, 521; *Brown v. Lynch*, 2 Bradford, 214; *Mears v. Sinclair*, 1 West Virginia, 185; *Pothier's Introduction Générale aux Coutumes*, No. 19; 1 *Burge Colonial and Foreign Law*, 39; 4 *Phillimore International Law* (2d ed.) § 97.

The preference due to the law of the ward's domicile, and the importance of a uniform administration of his whole estate, require that, as a general rule, the management and investment of his property

separate domicile, and cannot claim that of her husband. *White v. White*, 18 R. I. 292, 27 Atl. 506; *Dutcher v. Dutcher*, 39 Wis. 351.

For all purposes except that of bringing suit for divorce, the wife's domicile is that of her husband, even if she is living apart from him. *Warrender v. Warrender*, 9 Bligh, 103; *Dolphin v. Robbins*, 7 H. L. C. 390; *Christie's Succession*, 20 La. Ann. 353; *Greene v. Windham*, 13 Me. 225; *Greene v. Greene*, 11 Pick. 410; *Hackettstown Bank v. Mitchell*, 28 N. J. L. 516. *Contra*, *Shute v. Sargent*, 67 N. H. 305, *infra*, p. 211. If divorced from bed and board, however, the wife may and must have a separate domicile. *Williams v. Dormer*, 16 Jur. 366; *Barbour v. Barbour*, 21 How. 552. — Ed.

<sup>1</sup> This short statement of facts, presenting such facts as (in addition to those stated in the extract printed) are necessary for understanding so much of the case as is printed, is substituted for the statement by Mr. Justice Gray. Part of the opinion is omitted. — Ed.

should be governed by the law of the State of his domicile, especially when he actually resides there, rather than by the law of any State in which a guardian may have been appointed or may have received some property of the ward. If the duties of the guardian were to be exclusively regulated by the law of the State of his appointment, it would follow that in any case in which the temporary residence of the ward was changed from State to State, from considerations of health, education, pleasure, or convenience, and guardians were appointed in each State, the guardians appointed in the different States, even if the same persons, might be held to diverse rules of accounting for different parts of the ward's property. The form of accounting, so far as concerns the remedy only, must indeed be according to the law of the court in which relief is sought: but the general rule by which the guardian is to be held responsible for the investment of the ward's property is the law of the place of the domicile of the ward. Bar, International Law, § 106 (Gillespie's translation), 438; Wharton, Conflict of Laws, § 259.

It may be suggested that this would enable the guardian, by changing the domicile of his ward, to choose for himself the law by which he should account. Not so. The father, and after his death the widowed mother, being the natural guardian, and the person from whom the ward derives his domicile, may change that domicile. But the ward does not derive a domicile from any other than a natural guardian. A testamentary guardian nominated by the father may have the same control of the ward's domicile that the father had. *Wood v. Wood*, 5 Paige, 596, 605. And any guardian, appointed in the State of the domicile of the ward, has been generally held to have the power of changing the ward's domicile from one county to another within the same State and under the same law. *Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. 20; *Kirkland v. Whately*, 4 Allen, 462; *Anderson v. Anderson*, 42 Vermont, 350; *Ex parte Bartlett*, 4 Bradford, 221; *The Queen v. Whitby*, L. R. 5 Q. B. 325, 331. But it is very doubtful, to say the least, whether even a guardian appointed in the State of the domicile of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicile beyond the limits of the State in which the guardian is appointed and to which his legal authority is confined. *Douglas v. Douglas*, L. R. 12 Eq. 617, 625; *Daniel v. Hill*, 52 Alabama, 430; Story, Conflict of Laws, § 506, note; Dicey on Domicile, 100, 132. And it is quite clear that a guardian appointed in a State in which the ward is temporarily residing cannot change the ward's permanent domicile from one State to another.

The case of such a guardian differs from that of an executor or, or a trustee under, a will. In the one case, the title in the property is in the executor or the trustee; in the other, the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment. The executor or trustee is appointed at the domicile of the testator; the guardian is most fitly

appointed at the domicile of the ward, and may be appointed in any State in which the person or any property of the ward is found. The general rule which governs the administration of the property in the one case may be the law of the domicile of the testator; in the other case, it is the law of the domicile of the ward.

As the law of the domicile of the ward has no extraterritorial effect, except by the comity of the State where the property is situated, or where the guardian is appointed, it cannot of course prevail against a statute of the State in which the question is presented for adjudication, expressly applicable to the estate of a ward domiciled elsewhere. *Hoyt v. Sprague*, 103 U. S. 613. Cases may also arise with facts so peculiar or so complicated as to modify the degree of influence that the court in which the guardian is called to account may allow to the law of the domicile of the ward, consistently with doing justice to the parties before it. And a guardian, who had in good faith conformed to the law of the State in which he was appointed, might perhaps be excused for not having complied with stricter rules prevailing at the domicile of the ward. But in a case in which the domicile of the ward has always been in a State whose law leaves much to the discretion of the guardian in the matter of investments, and he has faithfully and prudently exercised that discretion with a view to the pecuniary interests of the ward, it would be inconsistent with the principles of equity to charge him with the amount of the moneys invested, merely because he has not complied with the more rigid rules adopted by the courts of the State in which he was appointed.

The domicile of William W. Sims during his life and at the time of his death in 1850 was in Georgia. This domicile continued to be the domicile of his widow and of their infant children until they acquired new ones. In 1853, the widow, by marrying the Rev. Mr. Abercrombie, acquired his domicile. But she did not, by taking the infants to the home, at first in New York and afterwards in Connecticut, of her new husband, who was of no kin to the children, was under no legal obligation to support them, and was in fact paid for their board out of their property, make his domicile, or the domicile derived by her from him, the domicile of the children of the first husband. Immediately upon her death in Connecticut, in 1859, these children, both under ten years of age, were taken back to Georgia to the house of their father's mother and unmarried sister, their own nearest surviving relatives; and they continued to live with their grandmother and aunt in Georgia until the marriage of the aunt in January, 1860, to Mr. Micou, a citizen of Alabama, after which the grandmother and the children resided with Mr. and Mrs. Micou at their domicile in that State.

Upon these facts, the domicile of the children was always in Georgia from their birth until January, 1860, and thenceforth was either in Georgia or in Alabama. As the rules of investment prevailing before 1863 in Georgia and in Alabama did not substantially differ, the question in which of those two States their domicile was is immaterial to



the decision of this case; and it is therefore unnecessary to consider whether their grandmother was their natural guardian, and as such had the power to change their domicile from one State to another. See Hargrave's note 66 to Co. Lit. 88 *b*; Reeve, Domestic Relations, 315; 2 Kent, Com. 219; Code of Georgia of 1861, §§ 1754, 2452; Darden v. Wyatt, 15 Georgia, 414.

Whether the domicile of Lamar in December, 1855, when he was appointed in New York guardian of the infants, was in New York or in Georgia, does not distinctly appear, and is not material; because, for the reasons already stated, wherever his domicile was, his duties as guardian in the management and investment of the property of his wards were to be regulated by the law of their domicile.

On petition for re-hearing, GRAY, J., said (114 U. S. 218): If the domicile of the father was in Florida at the time of his death in 1850, then, according to the principles stated in the former opinion, the domicile of his children continued to be in that State until the death of their mother in Connecticut in 1859. In that view of the case, the question would be whether they afterwards acquired a domicile in Georgia by taking up their residence there with their paternal grandmother. Although some books speak only of the father, or, in the case of his death, the mother, as guardian by nature (1 Bl. Com. 461; 2 Kent, Com. 219), it is clear that the grandfather or grandmother, when the next of kin, is such a guardian. Hargrave, note 66, to Co. Lit. 88 *b*; Reeve, Dom. Rel. 315. See also, Darden v. Wyatt, 15 Ga. 414. In the present case, the infants, when their mother died and they went to the home of their paternal grandmother, were under ten years of age; the grandmother, who appears to have been their only surviving grandparent and their next of kin, and whose only living child, an unmarried daughter, resided with her, was the head of the family; and upon the facts agreed it is evident that the removal of the infants after the death of both parents to the home of their grandmother in Georgia was with Lamar's consent. Under these circumstances, there can be no doubt that by taking up their residence with her, they acquired her domicile in that State in 1859, if their domicile was not already there.<sup>1</sup>

<sup>1</sup> The domicile of an infant follows that of his father: Metcalf v. Lowther, 56 Ala. 312; Kennedy v. Ryall, 67 N. Y. 379; and so long as the infant is not emancipated he can obtain no other domicile, though living away from his father's home: Wheeler v. Burrow, 18 Ind. 14; even if he has run away from home: Bangor v. Readfield, 32 Me. 60; or has been bound out to service by the public authorities: Oldtown v. Falmouth, 40 Me. 106.

Upon the death of the father, the mother's domicile ordinarily becomes that of the minor, and if she being *sui juris* changes her domicile that of the child follows; subject perhaps to the condition that the change be made *bona fide*, and not for the purpose of securing an advantage at the expense of the child or the child's estate. Pottinger v. Wightman, 3 Mer. 67; Brown v. Lynch, 2 Bradf. 214; School Directors v. James, 2 W. & S. 568. A posthumous child, therefore, takes the domicile of the mother at its birth: Watson v. Bondurant, 39 La. Ann. 1303 (*semble*). If, however, the mother marries again, since she is no longer *sui juris*, she cannot affect the domicile of the minor: School Directors v. James, 2 W. & S. 568; Allen v. Thomason, 11 Humph.

## SHUTE v. SARGENT.

SUPREME COURT OF NEW HAMPSHIRE. 1892.

[Reported 67 *New Hampshire*, 305.]

BLODGETT, J.<sup>1</sup> The maxim that the domicile of the wife follows that of her husband "results from the general principle that a person who is under the power and authority of another possesses no right to choose a domicile." Story, *Conf. Laws*, s. 46. "By marriage, husband and wife become one person in law, — that is, the very being or legal existence of the wife is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything." 1 Bl. Com. 442. Such being the common-law status of the wife, her domicile necessarily fol-

536 (*contra*, Succession of Lewis, 10 La. Ann. 789; and see *Wheeler v. Hollis*, 19 Tex. 522); and therefore if the mother remarries before the birth of the posthumous child, the child takes the domicile of its mother before the second marriage: *Oxford v. Bethany*, 19 Conn. 229.

An infant does not get the domicile of an appointed guardian *ex officio* if the infant actually lives elsewhere. *Louisville v. Sherley*, 80 Ky. 71; *School Directors v. James*, 2 W. & S. 568; *Petigru v. Ferguson*, 6 Rich. Eq. 378. The guardian may, however, change the infant's domicile by changing the actual home of the infant within the State. *Kirkland v. Whately*, 4 All. 462; *contra*, *Marheineke v. Grothaus*, 72 Mo. 204. He cannot, however, change the ward's domicile outside the State, since his authority over the ward's person ceases at the State line. *Douglas v. Douglas*, L. R. 12 Eq. 617, 625; *Robins v. Weeks*, 5 Mart. N. s. 379; *Trammell v. Trammell*, 20 Tex. 406; but see *Wood v. Wood*, 5 Paige, 596, 605; *Wheeler v. Hollis*, 19 Tex. 522. *A fortiori* such a change cannot be made without the guardian's consent. *Hiestand v. Kuns*, 8 Blackf. 345; *Munday v. Baldwin*, 79 Ky. 121.

An emancipated minor may acquire a new domicile by his own will: *Lubec v. Eastport*, 3 Me. 220; and such minor no longer shares a new domicile acquired by the father: *Lowell v. Newport*, 66 Me. 78; or by the mother, after the father's death: *Dennysville v. Trescott*, 30 Me. 470; *Charlestown v. Boston*, 13 Mass. 469. After emancipation the father cannot change the child's domicile. *In re Vance*, 92 Cal. 195, 28 Pac. 229.

In Georgia, where a guardian has no right to restrain the person of a ward twenty years old, such a ward may acquire a domicile by his own choice. *Roberts v. Walker*, 18 Ga. 5.

An apprentice takes the domicile of his master. *Maddox v. S.*, 32 Ind. 111.

An insane person, though under guardianship, may yet change his domicile if he in fact retains sufficient power of will. *Culver's Appeal*, 48 Conn. 165; *Concord v. Rumney*, 45 N. H. 423; *Mowry v. Latham*, 17 R. I. 480, 23 Atl. 13. A person *non compos* from birth, continuing to live in his father's family after reaching his majority, follows his father's domicile. *Sharpe v. Crispin*, L. R. 1 P. & D. 611; *Monroe v. Jackson*, 55 Me. 55; *Upton v. Northbridge*, 15 Mass. 237. If such a person has an appointed guardian, the latter may change the domicile of the ward into his own family by making him an inmate of it: *Holyoke v. Haskins*, 5 Pick. 20; *Jackson v. Polk*, 19 Ohio S. 28; or even, it has been held, to a new independent home: *Anderson v. Anderson*, 42 Vt. 350. It has been held that if one *non compos* becomes emancipated by the death of his parents and the failure of appointment of a guardian, he may gain a residence where he actually lives. *Gardiner v. Farmington*, 45 Me. 537. — Ed.

<sup>1</sup> The opinion only is given: it sufficiently states the case. — Ed.

lowed her husband's, and the maxim applied without limitation or qualification.

But the common-law theory of marriage has largely ceased to obtain everywhere, and especially in this State, where the law has long recognized the wife as having a separate existence, separate rights, and separate interests. In respect to the duties and obligations which arise from the contract of marriage and constitute its object, husband and wife are still, and must continue to be, a legal unit; but so completely has the ancient unity become dissevered, and the theory of the wife's servitude superseded by the theory of equality which has been established by the legislation and adjudications of the last half century, that she now stands, almost without an exception, upon an equality with the husband as to property, torts, contracts, and civil rights. Pub. Sts., c. 176; *ib.*, c. 90, s. 9; *Seaver v. Adams*, 66 N. H. 142, 143, and authorities cited. And since the law puts her upon an equality, so that he now has no more power and authority over her than she has over him, no reason would seem to remain why she may not acquire a separate domicile for every purpose known to the law. If, however, there are exceptional cases when for certain purposes it might properly be held otherwise, there can be in this jurisdiction no reason for holding that when the husband has forfeited his marital rights by his misbehavior, the wife may not acquire a separate domicile, and exercise the appertaining rights and duties of citizenship with which married women have become invested. To hold otherwise would not only break the line of consistency and progress which has been steadily advanced until the ancient legal distinctions between the sexes, which were adapted to a condition that has ceased to exist and can never return, have been largely swept away, but it would also be subversive of the statutory right of voting and being elected to office in educational matters which wives now possess (Pub. Sts., c. 90, ss. 9, 14), inasmuch as it would compel the innocent wife to reside and make her home in whatever voting precinct the offending husband might choose to fix his domicile, or to suffer the deprivation of the elective franchise; and if he should remove his domicile to another State, and she should remain here, the exercise of all her rights dependent upon domicile would be similarly affected.

This cannot be the law. On the contrary, the good sense of the thing is, that a wife cannot be divested of the right of suffrage, or be deprived of any civil or legal right, by the act of her husband; and so we take the law to be. Whenever it is necessary or proper for her to acquire a separate domicile, she may do so. This is the rule for the purposes of divorce (*Payson v. Payson*, 34 N. H. 518; *Cheever v. Wilson*, 9 Wall. 108, 124; *Ditson v. Ditson*, 4 R. I. 87, 107; *Harding v. Alden*, 9 Greenl. 140), and it is the true rule for all purposes.

Upon these views, the testatrix was domiciled in this State at the time of her decease, and, as the consequence, distribution of her estate is to be made accordingly. *Goodall v. Marshall*, 11 N. H. 88; *Vande-*

walker v. Rollins, 63 N. H. 460, 463, 464. The rights of her husband therein are not affected by his written assent to the will. The Massachusetts statute, making such assent binding, has no extraterritorial force, and there is no principle upon which it can be given effect in this jurisdiction without violating the positive enactments of our statute relative to the husband's distributive share in his deceased wife's estate. Pub. Sts., c. 195, ss. 12, 13. This cannot be done. If the result shall be to give to this husband a benefit which the testatrix did not intend he should receive, and which in justice he ought not to have, it is to be regretted; but hard cases cannot be permitted to make bad equity any more than bad law. *Case discharged.*<sup>1</sup>

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BERGNER & ENGEL BREWING CO. v. DREYFUS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1898.

[Reported 172 Massachusetts, 154.]

HOLMES, J.<sup>2</sup> This is a suit by a Pennsylvania corporation to recover a debt for goods sold and delivered here. The only defence is a discharge in insolvency under our statutes, which of course commonly is no defence at all. This was reaffirmed unanimously in 1890, after full consideration of the objections now urged; and it was decided also, not for the first time, that the general language of the insolvent law was not intended to affect access to Massachusetts courts by a local rule of procedure unless the substantive right was barred by the discharge. *Phoenix National Bank v. Batcheller*, 151 Mass. 589. The grounds urged for an exception in the present case are: that the plaintiff, although its brewery and main offices are in Pennsylvania, has an office in Boston, and maintains here a complete outfit for the distribution of its products; that it has a license of the fourth class under Pub. Sts. c. 100, § 10; and that it has complied with the laws regulating foreign corporations doing business here, including, we assume, that which requires the appointment of the commissioner of corporations its "attorney upon whom all lawful processes in any action or proceeding against it may be served." St. 1884, c. 330, § 1. See St. 1895, c. 157. . . . The independent ground on which it is urged that the plaintiff is subject to the insolvent law in the present case is that the plaintiff is domesticated in this State, as shown by the facts above recited, of which the appointment of an attorney is only one. The word "domesticated," which was used in the argument for the defendant, presents no definite legal conception which has any bearing upon the case. We presume that it was intended to convey in a conciliatory form the notion that the plaintiff was domiciled here, — "resident," in

<sup>1</sup> *Acc. In re Florance*, 54 Hun, 328. — Ed.

<sup>2</sup> The statement of facts and part of the opinion are omitted. — Ed.

the language of Pub. Sts. c. 157, § 81, — and therefore barred by the language and legal operation of the act. It could not be contended that the corporation was a citizen of Massachusetts. In such sense as it is a citizen of any State, it is a citizen of the State which creates it and of no other. But there are even greater objections to a double domicile than there are to double citizenship. Under the law as it has been, a man might find himself owing a double allegiance without any choice of his own. But domicile, at least for any given purpose, is single by its essence. Dicey, *Confl. of Laws*, 95. A corporation does not differ from a natural person in this respect. If any person, natural or artificial, as a result of choice or on technical grounds of birth or creation, has a domicile in one place, it cannot have one elsewhere, because what the law means by domicile is the one technically pre-eminent headquarters, which, as a result either of fact or of fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined. It is settled that a corporation has its domicile in the jurisdiction of the State which created it, and as a consequence that it has not a domicile anywhere else. *Boston Investment Co. v. Boston*, 158 Mass. 461, 462, 463. *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 450; *Martine v. International Ins. Co.*, 53 N. Y. 339, 346. The so-called modifications of this rule by statutes like the act of 1884 do not modify it, because jurisdiction of the ordinary personal actions does not depend upon domicile, but only upon such presence within the jurisdiction as to make service possible. See *In re Hohorst*, 150 U. S. 653. But the operation of our insolvent law by its very terms may, and in this case does, depend upon the domicile of the creditor, and as there can be no doubt either in fact or in law that the plaintiff was domiciled in Pennsylvania in such a sense that a statute like Pub. Sts. c. 157, § 1, would hit it there, it cannot have been domiciled here for the same purpose at the same time.

*Judgment for the plaintiff affirmed.*<sup>1</sup>

FIELD, C. J., dissenting.

<sup>1</sup> *Acc. Germania F. I. Co. v. Francis*, 11 Wall. 210; *Cook v. Hager*, 3 Col. 386; *Chafee v. Fourth Nat. Bank*, 71 Me. 514; *B. & O. R. R. v. Glenn*, 28 Md. 287.

*Dicta* in the English cases are, however, *contra*. *Newby v. Van Oppen*, L. R. 7 Q. B. 293; *Russell v. Cambefort*, 23 Q. B. D. 526. "I think that this company may properly be deemed both Scotch and English. It may, for purposes of jurisdiction, be deemed to have two domiciles. Its business is necessarily carried on by agents, and I do not know why its domicile should be considered to be confined to the place where the goods are manufactured. The business transacted in England is very extensive. The places of business may, for the purposes of jurisdiction, properly be deemed the domicile." — Lord St. Leonards in *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416, 449. — Ed.

In *Martine v. International L. Ins. Soc.*, 53 N. Y. 339, an English company with a permanent general agency in New York was held, as to business done through such agency, to have, in time of war, a commercial (though not an ordinary civil) domicile in New York.

## HAYS v. PACIFIC MAIL STEAMSHIP CO.

SUPREME COURT OF THE UNITED STATES. 1855.

*[Reported 17 Howard, 596.]*

NELSON, J. This is a writ of error to the District Court for the Northern District of California.

The suit was brought in the District Court by the company, to recover back a sum of money which they were compelled to pay to the defendant, as taxes assessed in the State of California, upon twelve steamships belonging to them, which were temporarily within the jurisdiction of the State.

The complaint sets forth that the plaintiffs are an incorporated company by the laws of New York; that all the stockholders are residents and citizens of that State; that the principal office for transacting the business of the company is located in the city of New York, but, for the better transaction of their business, they have agencies in the city of Panama, New Grenada, and in the city of San Francisco, California; that they have, also, a naval dock and shipyard at the port of Benicia, of that State, for furnishing and repairing their steamers; that, on the arrival at the port of San Francisco, they remain no longer than is necessary to land their passengers, mails, and freight, usually done in a day; they then proceed to Benicia, and remain for repairs and refitting until the commencement of the next voyage, usually some ten or twelve days; that the business in which they are engaged is in the transportation of passengers, merchandise, treasure, and the United States mails, between the city of New York and the city of San Francisco, by way of Panama, and between San Francisco and different ports in the Territory of Oregon; that the company are sole owners of the several vessels, and no portion of the interest is owned by citizens of the State of California; that the vessels are all ocean steamships, employed exclusively in navigating the waters of the ocean; that all of them are duly registered at the custom-house in New York, where the owners reside; that taxes have been assessed upon all the capital of the plaintiffs represented by the steamers in the State of New York, under the laws of that State, ever since they have been employed in the navigation, down to the present time; that the said steamships have been assessed in the State of California and county of San Francisco, for the year beginning 1st July, 1851, and ending 30th June, 1852, claiming the assessment as annually due, under an act of

the legislature of the State; that the taxes assessed amount to \$11,962.50, and were paid under protest, after one of the vessels was advertised for sale by the defendant, in order to prevent a sale of it.

To this complaint the defendant demurred, and the court below gave judgment for the plaintiffs.

By the 3d section of the Act of Congress of 31st December, 1792, it is provided that every ship or vessel, except as thereafter provided, shall be registered by the collector of the district, in which shall be comprehended the port to which the ship or vessel shall belong at the time of her registry, and which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, nearest to the place where the husband, or acting and managing owner, usually resides; and the name of the ship, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length; and if any ship or vessel of the United States shall be found without having her name, and the name of the port to which she belongs, painted in the manner mentioned, the owner or owners shall forfeit fifty dollars.

And by the Act of 29th July, 1850 (9 Stats. at Large, 440), it is provided that no bill of sale, mortgage, or conveyance of any vessel shall be valid against any person other than the grantor, etc., and persons having actual notice, unless such bill of sale, mortgage, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled.

These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside. In this case, therefore, the home port of the vessels of the plaintiffs was the port of New York, where they were duly registered, and where all the individual owners are resident, and where is also the principal place of business of the company; and where, it is admitted, the capital invested is subject to State, county, and other local taxes.

These ships are engaged in the transportation of passengers, merchandise, etc., between the city of New York and San Francisco, by the way of Panama, and between San Francisco and different ports in the territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the States.

Now, it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax. It may be that the course of trade or other circumstances might not occasion as great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, etc., which in no respect can affect the question as to the *situs* of the property, in view of the right of taxation by the State.

Besides, whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port. Our merchant vessels are not unfrequently absent for years, in the foreign carrying trade, seeking cargo, carrying and unloading it from port to port, during all the time absent; but they neither lose their national character nor their home port, as inscribed upon their stern.

The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State, is familiar in the admiralty law, and she is subjected, in many cases, to the application of a different set of principles. 7 Pet. 324; 4 Wheat. 438.

We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid.

An objection is taken to the recovery against the collector, on the ground, mainly, that the assessment under the law of California, by the assessors, was a judicial act, and that the party should have pursued his remedy to set it aside according to the provisions of that law.

We do not think so. The assessment was not a judicial, but a ministerial act, and as the assessors exceeded their powers in making it, the officer is not protected.

The payment of the tax was not voluntary, but compulsory, to prevent the sale of one of the ships.

Our conclusion is, that the judgment of the court below is right, and should be affirmed.<sup>1</sup>

<sup>1</sup> *Acc. Johnson v. Debary-Baya Merchants' Line*, 37 Fla. 499, 19 So. 640; *Roberts v. Charlevoix*, 60 Mich. 197; *S. v. Haight*, 30 N. J. L. 428. So generally as to



## HOYT v. COMMISSIONERS OF TAXES.

COURT OF APPEALS OF NEW YORK. 1861.

[Reported 23 New York, 224.]

COMSTOCK, C. J. The legislature, in defining property which is liable to taxation, have used the following language: "All lands and all personal estate *within this State*, whether owned by individuals or corporations, shall be liable to taxation subject to the exemptions hereinafter specified." (1 R. S., 387, § 1.) The title of the act in which this provision is contained, is, "of the property liable to taxation," and it is in this title that we ought to look for controlling definitions on the subject. Other enactments relate to the details of the system of taxation, to the mode of imposing and collecting the public burdens, and not to the property or subject upon which it is imposed. In order, therefore, to determine the question now before us, the primary requisite is to interpret justly and fairly the language above quoted.

"All lands and all personal estate within this State shall be liable to taxation." If we are willing to take this language, without attempting to obscure it by introducing a legal fiction as to the *situs* of personal estate, its meaning would seem to be plain. Lands and personal property having an actual situation within the State are taxable, and by a necessary implication no other property can be taxed. I know not in what language more appropriate or exact the idea could have been expressed. Real and personal estate are included in precisely the same form of expression. Both are mentioned as being within the State. It is conceded that lands lying in another State or country, cannot be taxed against the owner resident here, and no one ever supposed the contrary. Yet it is claimed that goods and chattels situated in Louisiana, or in France, can be so taxed. The legislature I suppose could make this distinction, but that they have not made it, in the language of the statute is perfectly clear. Nor is the reason apparent why such a distinction should be made. Lands have an actual *situs*, which of course is immovable. Chattels also have an actual *situs*, although they can be moved from one place to another. Both are equally protected by the laws of the State or sovereignty in which they are situated, and both are chargeable there with public burdens, according to all just principles of taxation. A purely poll tax has no respect to property. We have no such tax. With us taxation is upon property, and so it is in all the States of the Union. So also in general, it is in all countries. The logical result is, that the tax is incurred within the jurisdiction and under the laws of the country where it is situated. If we say that taxation is on the person

property merely *in transitu*. *Standard Oil Co. v. Bachelor*, 89 Ind. 1; *Conley v. Chedie*, 7 Nev. 336; *Robinson v. Longley*, 18 Nev. 71; see *Carrier v. Gordon*, 21 Oh. S. 605. — ED

in respect to the property, we are still without a reason for assessing the owner resident here, in respect to one part of his estate situated elsewhere, and not in respect to another part. Both, I repeat, are the subjects of taxation in the foreign jurisdiction. If then the owner ought to be subjected to a double burden as to one, why not as to the other also?

I find then no room for interpretation, if we take the words of the statute in their plain ordinary sense. The legislative definition of taxable property refers in that sense to the actual *situs* of personal not less than real estate. If the intention had been different, it cannot be doubted that different language would have been used. It would have been so easy and so natural to have declared that all lands within this State, and all personal property wherever situated, owned by residents of this State, shall be liable to taxation, that we should have expected just such a declaration, if such had been the meaning of the law-making power. To me, it is evident that the legislature were not enunciating a legal fiction which, as we shall presently see, expresses a rule of law in some circumstances and relations, but which in others is not the law. They were speaking in plain words, and to the plain understanding of men in general. When they said all real and all personal estate within this State, I see no room for a serious doubt that they intended property actually within the State wherever the owner might reside.

It is said, however, that personal estate by a fiction of law has no *situs* away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicile. The right to tax the relator's property situated in New Orleans and New Jersey, rests upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law which, to all intents and purposes, transfers the property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The necessary consequence is, that goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad. They cannot be taxed here, because they are with the owner who is a citizen or subject of some foreign State. On the same ground, if we are to have harmonious rules of law, we ought to relinquish the administration of the effects of a person resident and dying abroad, although the claims of domestic creditors may require such administration. So, in the case of the bankruptcy of such a person, we should at once send abroad his effects, and cannot consistently retain them to satisfy the claims of our own citizens. Again, we ought not to have laws for attaching the personal estate of non-residents, because such laws necessarily assume that it has a *situs* entirely distinct from the owner's domicile. Yet we do in certain cases administer upon goods and chattels of a foreign decedent; we refuse to give up the effects of a bankrupt until creditors here are paid; and we have laws

of attachment against the effects of non-resident debtors. These, and other illustrations which might be mentioned, demonstrate that the fiction or maxim *mobilia personam sequuntur* is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice, according to the maxim, *in fictione juris semper æquitas existat*. "No fiction," says Blackstone, "shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, which might result from the general rule of law." So Judge Story, referring to the *situs* of goods and chattels, observes: "The general doctrine is not controverted, that although movables are for many purposes to be deemed to have no *situs*, except that of the domicile of the owner, yet this being but a legal fiction it yields whenever it is necessary, for the purpose of justice, that the actual *situs* of the thing should be examined." He adds quite pertinently, I think, to the present question, "A nation within whose territory any personal property is actually situated, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." (Conf. of Laws, § 550.) I can think of no more just and appropriate exercise of the sovereignty of a State or nation over property, situated within it and protected by its laws, than to compel it to contribute toward the maintenance of government and law.

Accordingly there seems to be no place for the fiction of which we are speaking, in a well-adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the *situs* of the property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other: because we ought to suppose, indeed we are bound to assume, that other States and Governments have adopted the same rule. If then proceeding on the true principles of taxation, we subject to its burdens all goods and chattels actually within our jurisdiction, without regard to the owner's domicile, it must be understood that the same rule prevails everywhere. If we also proceed on the opposite rule, and impose the tax on account of the domicile, without regard to the actual *situs*, while the same property is taxed in another sovereignty by reason of its *situs* there, we necessarily subject the citizen to a double burden of taxation. For this no sound reason can be given. To put a strong case. The owner of a southern plantation with his thousand slaves upon it, may prefer to reside and spend his income in New York. Our laws protect him in his person as a citizen of the State, and for this the State receives a sufficient con-

sideration without taxing the capital which it does not protect. Under our laws can we tax the wealth thus invested in slave property? They ignore, on the contrary, the very existence of such property, and therefore there is no room for the fiction according to which, and only according to which, the *situs* is supposed to be here. But if we could make room for that fiction, still it remains to be shown that some rule of reason or principle of equity can be urged in favor of such taxation. This cannot be shown, and the attempt has not been made.

We may reverse the illustration. A citizen and resident of Massachusetts may own a farm in one of the counties of this State, and large wealth belonging to him may be invested in cattle, in sheep or horses which graze the fields, and are visible to the eyes of the taxing power. Now these goods and chattels have an actual *situs*, as distinctly so as the farm itself. Putting the inquiry then with reference to both, are they "real estate and personal estate *within this State*," so as to be subject to taxation under that definition? It seems to me but one answer can be given this question, and that answer must be according to the actual truth of the case. If we take the fiction instead of the truth, then the *situs* of these chattels is in Massachusetts, and they are not within this State. The statute means one thing or the other. It cannot have double and inconsistent interpretations. And as this is impossible so we cannot, under and according to the statute, tax the citizen of Massachusetts in respect to his chattels here, and at the same time tax the citizen of New York in respect to his chattels having an actual *situs* there. In both cases the property must be "within this State," or there is no right to tax it at all. It cannot be true in fact, if a Massachusetts man owns two spans of horses, one of which draws his carriage at home and the other is kept on his farm here, that both are within the State. It cannot be true by any legal intendment, because the same intendment which locates one of them here, must locate the other abroad and beyond the taxing power. It seems to follow then inevitably that before we can uphold the tax which has been imposed upon the relator's property situated in New Orleans and New Jersey, we must first determine, that if he resided there, and the same goods and chattels were located here, they could not be taxed as being within the State. Such a determination I am satisfied would contravene the plain letter of the statute as well as all sound principles underlying the subject.<sup>1</sup>

<sup>1</sup> The remainder of the opinion is omitted.

*Acc. Dunleith v. Rogers*, 53 Ill. 45; *Leonard v. New Bedford*, 16 Gray, 292; *S. v. Ross*, 23 N. J. L. 517; *Hardesty v. Fleming*, 57 Tex. 395.

"We have no difficulty in disposing of the last condition of the question, namely: the fact, if it be a fact, that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by non-residents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property

## McKEEN v. COUNTY OF NORTHAMPTON.

SUPREME COURT OF PENNSYLVANIA. 1865.

[*Reported 49 Pennsylvania, 519.*]

AGNEW, J. James McKeen is the owner of four hundred and seventy-two shares of the capital stock of a manufacturing company, incorporated under the laws of New Jersey, doing business and holding its property in Warren county in that State. McKeen himself is a resident of Easton, Pennsylvania, and the question is, whether his stock is taxable here for State and county purposes.

The taxing power rests upon the reciprocal duties of protection and support between the State and the citizen, and the exclusive sovereignty and jurisdiction of the State over the persons and property within its territory. In *McCullough v. The State of Maryland*, 4 Wheat. 487, Marshall, C. J., remarks of the taxing power: "It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is incident. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation." Story, in his *Conflict of Laws*, § 19, says: "The sovereign has power and authority over his subjects, and over the property which they possess within his dominions." See *Id.* §§ 18 and 20.

The defendant below being a citizen of this State, it is clear he is subject personally to its power to tax, and that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the State, is equally within this authority. The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him, and when he dies his domicile governs its succession. It goes to his executor or administrator, and not to the heirs, and is carried into the inventory of his personal effects. When it is argued, therefore, that the foundry, machine-shop, and other estate of the corporation, being within the State of New Jersey, are subject wholly to the same exclusive State jurisdiction there which we claim for this State over property within its territory, another ownership is stated and a new issue introduced. But to that property the defendant below has no title; his title being in the shares he holds, and not in the property of the corporation. No execution against him there would sell a spark of right to it, nor would his heirs at law sue-

belonging to or in the use of the Government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary."—BRADLEY, J., in *Coe v. Errol*, 116 U. S. 517 (1886). *Acc* *Winkley v. Newton*, 67 N. H. 80; 36 Atl. 610. — Ed.

ceed to any estate in it. Unquestionably it may be taxed as the property of the corporation in New Jersey; but the ownership there is that of the corporation, the legal entity, and not of the natural persons who own the shares of its stock.

The stock of individuals may be controlled, to a certain extent, in New Jersey to make it liable to the claims of their domestic creditors, or legatees and next of kin. Even ancillary administration may be granted there to preserve the estate for resident claimants. But even then the residue of McKee's stock would be remitted to the executors or administrators of the domicile in Pennsylvania, and the right of succession would be governed by our laws; thus proving that though local authority may attach to the stock for special purposes, its ownership has its legal *situs* at the domicile of the owner. There is abundant authority for this: *Mothland v. Wireman*, administrator of *Thornburg*, 3 Penn. 185; *Miller's Estate*, 3 Rawle, 312; *Stokely's Estate*, 7 Harris, 476; *Dent's Appeal*, 10 Id. 514.

Another feature is noticeable. In the exercise of the authority to tax, the proceeding is personal only. Though different kinds of property are specified as the subjects of taxation, it is not as a proceeding *in rem*, but only as affording the means and measure of taxation. The tax is assessed personally, and the means of enforcement is a warrant against the person of the owner, and any property he has whether taxed or not: Act 15th April, 1834, §§ 20, 21; *Purd.* 1861, pp. 938-939.

We have authorities directly upon this question deciding the principle, though upon a different species of tax — the collateral inheritance tax: *In re Short's Estate*, 11 Harris, 63. The decedent, a resident of Philadelphia, owned half a million of dollars in stocks and corporations of other States, and bonds of the State of Kentucky, and a bank deposit in New York; all were held to be subject to the collateral inheritance tax here. *Gibson, C. J.*, opens his opinion by stating: "That Mr. Short's property out of the State subjected him to personal liability for taxes assessed on it here *in his lifetime*, is not to be doubted. The general rule is, that the *situs* of personal property follows the domicile of the owner of it, inasmuch that even a creditor cannot reach it in a foreign country, except by attachment or some other process provided by the local law; certainly not by a personal action, without appearance or something equivalent to it." To the same effect is the case of *Hood's Estate*, 9 Harris, 106; the difference of domicile merely leading to an opposite result.

The court below was right in entering judgment for the whole amount of the taxes, State and county. The question of liability for *county* taxes is disposed of in the opinion just read in the case of *Whitesell v. Northampton County*. *Judgment affirmed.*<sup>1</sup>

<sup>1</sup> *Acc. Seward v. Rising Sun*, 79 Ind. 351; *Dwight v. Boston*, 12 All. 316; *Hall v. Fayetteville*, 115 N. C. 281, 20 S. E. 373; *Bradley v. Bander*, 26 Oh. S. 28; *Dyer v. Osburn*, 11 R. I. 321.

"In the absence of constitutional restrictions, the citizen may be taxed in the dis-

## STATE TAX ON FOREIGN-HELD BONDS.

SUPREME COURT OF THE UNITED STATES. 1873.

[*Reported*, 15 *Wallace*, 300.]

FIELD, J.<sup>1</sup> The question presented in this case for our determination is whether the eleventh section of the Act of Pennsylvania of May, 1868, so far as it applies to the interest on bonds of the railroad company, made and payable out of the State, issued to and held by non-residents of the State, citizens of other States, is a valid and constitutional exercise of the taxing power of the State, or whether it is an interference, under the name of a tax, with the obligation of the contracts between the non-resident bondholders and the corporation. If it be the former, this court cannot arrest the judgment of the State court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

The case before us is similar in its essential particulars to that of *The Railroad Company v. Jackson*, reported in 7 *Wallace*. There, as here, the company was incorporated by the legislatures of two States, Pennsylvania and Maryland, under the same name, and its road extended in a continuous line from Baltimore in one State to Sunbury in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their security upon its entire road, its franchises and fixtures, including the portion lying in both States. Coupons for the different instalments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either State. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the Circuit Court of the United States for the District of Maryland. That court, the chief justice presiding, instructed the jury that if the

creation of the legislature, either personally, by way of poll-tax, or upon the value of his property, wherever situate or however elsewhere taxed, to such extent as the public exigencies may require. . . . The very nature of choses in action is that they have no locality, but follow the person of the owner. As they sometimes virtually represent property that is situated elsewhere, and it may be taxed elsewhere, there is in some cases a double taxation; but this results from our peculiar situation, and although undoubtedly to be avoided, and not to be assumed as intended without plain enactments admitting of no other reasonable interpretation, yet so far as it is produced by that conflict of laws which arises from a variety of sovereignties so intimately connected as ours, it frequently cannot be avoided, and at all events has not been attempted to be prevented, by either the national or the State constitutions." *ELMER, J.*, in *State v. Bentley*, 23 N. J. L. 532 (1852). — *Ed.*

<sup>1</sup> The opinion only is given. — *Ed.*

plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax under the law of Pennsylvania could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the acts of her legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned justice, who delivered the opinion of the court, reached this conclusion, may be open, perhaps, to some criticism. It is not perceived how the fact that the mortgage given for the security of the bonds in that case covered that portion of the road which extended into Maryland could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another State, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that State. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors, in any sense: they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse



terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.

The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The Act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent upon every dollar, and pay it into the treasury of the Commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

The case of *Maltby v. The Reading and Columbia Railroad Company*, decided by the Supreme Court of Pennsylvania in 1866, was referred to by the Common Pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that State. But it is evident from a perusal of the opinion of the court that the decision proceeded upon the idea that the bond of the non-resident was itself property in the State because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the Legislature of

Pennsylvania cannot impose a personal tax upon the citizen of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state that the principle of taxation as the correlative of protection is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the Commonwealth, and as an investment rests upon State authority, and, therefore, ought to contribute to the support of the State government. It also adds that, though the loan is for some purposes subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the company could not enforce it except in that State, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the State which creates and protects a corporation ought to have the right to tax the loans negotiated by it, though taken and held by non-residents, a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in whatever manner made payable it would ultimately fall on the company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations. But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the State, or that the non-resident had any property in the State which was subject to taxation within the principles laid down by the court itself, which we have cited.

The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been fre-

quently ruled by her highest court. In *Witmer's Appeal*, 45 Penn. S. 463, the court said: "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it, and no more than liens." And in that State all possible interests in lands, whether vested or contingent, are subject to levy and sale on execution, yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises cannot be taken in execution for his debt. In *Rickert v. Madeira*, 1 Rawle, 329, the court said: "A mortgage must be considered either as a chose in action or as giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out and subject it to a dower and to the lien of a judgment; and that it is but a chose in action, a mere evidence of debt, is apparent from the whole current of decisions." *Wilson v. Shoenberger's Executors*, 31 Penn. S. 295.

Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that State owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner.

It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

Cases were cited by counsel on the argument from the decisions of the highest courts of several States, which accord with the views we have expressed. In *Davenport v. The Mississippi and Missouri Railroad Company*, 12 Iowa, 539, the question arose before the Supreme Court of Iowa whether mortgages on property in that State held by non-residents could be taxed under a law which provided that all prop-

erty, real and personal, within the State, with certain exceptions not material to the present case, should be subject to taxation, and the court said:—

“Both in law and equity the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the State, but, the mortgage itself being personal property, a chose in action attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the State. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the State, and if not they are not the subject of taxation.”

In *People v. Eastman*, 25 Cal. 603, the question arose before the Supreme Court of California whether a judgment of record in Mariposa County upon the foreclosure of a mortgage upon property situated in that county could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the county where situated; and it was held that it was not taxable there. “The mortgage,” said the court, “has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the State; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another although the debt secured is the same.”

Some adjudications in the Supreme Court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in *Maltby v. Reading and Columbia Railroad Company*, particularly the case of *McKeen v. The County of Northampton*, 49 Penn. S. 519, and the case of *Short's Estate*, 16 Id. 63, but we do not deem it necessary to pursue the matter further. We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State, the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extraterritorial operation; nor can any law of that State, inconsistent with the terms of a con-

tract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extraterritorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this court. *Ogden v. Saunders*, 12 Wheaton, 214; *Baldwin v. Hale*, 1 Wallace, 223. A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State.

*Judgment reversed, and the cause remanded for further proceedings, in conformity with this opinion.*<sup>1</sup>

DAVIS, CLIFFORD, MILLER, and HUNT, JJ., dissenting.

## PULLMAN'S PALACE-CAR CO. v. PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1891.

[Reported 141 *United States*, 18.]

GRAY, J.<sup>2</sup> Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania, is a question on which the decision of the highest court of the State is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. *Green v. Van Buskirk*, 5

<sup>1</sup> See *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490; *Detroit v. Board of Assessors*, 91 Mich. 78.—Ed.

<sup>2</sup> Part of the opinion of the court and part of the dissenting opinion are omitted.—Ed.

Wall. 307. and 7 Wall. 139; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Harkness v. Russell*, 118 U. S. 663, 679; *Walworth v. Harris*, 129 U. S. 355; Story on Conflict of Laws, § 550; Wharton on Conflict of Laws, §§ 297-311. As observed by Mr. Justice Story, in his commentaries just cited, "Although movables are for many purposes to be deemed to have no *situs*, except that of the domicile of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax. *Lane County v. Oregon*, 7 Wall. 71, 77; *Railroad Co. v. Pennsylvania*, 15 Wall. 300, 323, 324, 328; *Railroad Co. v. Peniston*, 18 Wall. 5, 29; *Tappan v. Merchants' Bank*, 19 Wall. 490, 499; *State Railroad Tax Cases*, 92 U. S. 575, 607, 608; *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517, 524; *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. . . .

The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property, within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which

these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the State courts, to questions under the Constitution and laws of the United States.

In the State Railroad Tax Cases, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital, and franchise, was assessed by the State Board of Equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the Constitution of the State; and Mr. Justice Miller, delivering judgment, said:—

“Another objection to the system of taxation by the State is, that the rolling stock, capital stock, and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city, or town, but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. *Green v. Van Buskirk*, 5 Wall. 312. Like all other laws of a State, it is, therefore, subject to legislative repeal, modification, or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation.” 92 U. S. 607, 608.

“It is further objected that the railroad track, capital stock, and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city, and town collects taxes according to the length

of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. Delaware Railroad Tax, 18 Wall. 206; Erie Railroad *v.* Pennsylvania, 21 Wall. 492." 92 U. S. 608, 611.

So in *Western Union Telegraph Co. v. Attorney-General of Massachusetts*, 125 U. S. 530, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the State, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

Even more in point is the case of *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the State of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said: —

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such



a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases, the tax might be fixed by an appraisal and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." 127 U. S. 123, 124.

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicile, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

*Judgment affirmed.*

MR. JUSTICE BRADLEY, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE HARLAN, dissenting.

I dissent from the judgment of the court in this case, and will state briefly my reasons. I concede that all property, personal as well as real, within a State, and belonging there, may be taxed by the State. Of that there can be no doubt. But where property does not belong in the State another question arises. It is the question of the jurisdiction of the State over the property. It is stated in the opinion of the court as a fundamental proposition on which the opinion really turns that all personal as well as real property within a State is subject to the laws thereof. I conceive that that proposition is not maintainable as a general and absolute proposition. Amongst independent nations, it is true, persons and property within the territory of a nation are subject to its laws, and it is responsible to other nations for any injustice it may do to the persons or property of such other nations. This is a rule of international law. But the States of this government are not independent nations. There is such a thing as a Constitution of the United States, and there is such a thing as a government of the United States, and there are many things, and many persons, and many articles of property that a State cannot lay the weight of its finger upon, because it would be contrary to the Constitution of the United States. Certainly, property merely carried through a State cannot be taxed by the State. Such a tax would be a duty — which a State cannot impose.

If a drove of cattle is driven through Pennsylvania from Illinois to New York, for the purpose of being sold in New York, whilst in Pennsylvania it may be subject to the police regulations of the State, but it is not subject to taxation there. It is not generally subject to the laws of the State as other property is. So if a train of cars starts at Cincinnati for New York and passes through Pennsylvania, it may be subject to the police regulations of that State whilst within it, but it would be repugnant to the Constitution of the United States to tax it. We have decided this very question in the case of *State Freight Tax*, 15 Wall. 232. The point was directly raised and decided that property on its passage through a State in the course of interstate commerce cannot be taxed by the State, because taxation is incidentally regulation, and a State cannot regulate interstate commerce. The same doctrine was recognized in *Coe v. Errol*, 116 U. S. 517.

And surely a State cannot interfere with the officers of the United States, in the performance of their duties, whether acting under the Judicial, Military, Postal, or Revenue Departments. They are entirely free from State control. So a citizen of the United States, or any other person, in the performance of any duty, or in the exercise of any privilege, under the Constitution or laws of the United States, is absolutely free from State control in relation to such matters. So that the general proposition, that all persons and personal property within a State is subject to the laws of the State, unless materially modified, cannot be true.

Bnt. when personal property is permanently located within a State for the purpose of ordinary use or sale, then, indeed, it is subject to the laws of the State and to the burdens of taxation; as well when owned by persons residing out of the State, as when owned by persons residing in the State. It has then acquired a *situs* in the State where it is found.

A man residing in New York may own a store, a factory, or a mine in Alabama, stocked with goods, utensils, or materials for sale or use in that State. There is no question that the *situs* of personal property so situated is in the State where it is found, and that it may be subjected to double taxation, — in the State of the owner's residence, as a part of the general mass of his estate; and in the State of its *situs*. Although this is a consequence which often bears hardly on the owner, yet it is too firmly sanctioned by the law to be disturbed, and no remedy seems to exist but a sense of equity and justice in the legislatures of the several States. The rule would undoubtedly be more just if it made the property taxable, like lands and real estate, only in the place where it is permanently situated.

Personal as well as real property may have a *situs* of its own, independent of the owner's residence, even when employed in interstate or foreign commerce. An office or warehouse, connected with a steamship line, or with a continental railway, may be provided with furniture and all the apparatus and appliances usual in such establishments. Such

property would be subject to the *lex rei sitæ* and to local taxation, though solely devoted to the purposes of the business of those lines. But the ships that traverse the sea, and the cars that traverse the land, in those lines, being the vehicles of commerce, interstate or foreign, and intended for its movement from one State or country to another, and having no fixed or permanent *situs* or home, except at the residence of the owner, cannot, without an invasion of the powers and duties of the federal government, be subjected to the burdens of taxation in the places where they only go or come in the transaction of their business, except where they belong. *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *Transportation Co. v. Wheeling*, 99 U. S. 273. To contend that there is any difference between cars or trains of cars and ocean steamships in this regard, is to lose sight of the essential qualities of things. This is a matter that does not depend upon the affirmative action of Congress. The regulation of ships and vessels, by act of Congress, does not make them the instruments of commerce. They would be equally so if no such affirmative regulations existed. For the States to interfere with them in either case would be to interfere with, and to assume the exercise of, that power which, by the Constitution, has been surrendered by the States to the government of the United States, namely, the power to regulate commerce.

Reference is made in the opinion of the court to the case of *Railroad Company v. Maryland*, 21 Wall. 456, in which it was said that commerce on land between the different States is strikingly dissimilar in many respects from commerce on water; but that was said in reference to the highways of transportation in the two cases, and the difference of control which the State has in one case from that which it can possibly have in the other. A railroad is laid on the soil of the State, by virtue of authority granted by the State, and is constantly subject to the police jurisdiction of the State; whilst the sea and navigable rivers are highways created by nature, and are not subject to State control. The question in that case related to the power of the State over its own corporation, in reference to its rate of fares and the remuneration it was required to pay to the State for its franchises, — an entirely different question from that which arises in the present case.

Reference is also made to expressions used in the opinion in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, which, standing alone, would seem to concede the right of a State to tax foreign corporations engaged in foreign or interstate commerce, if such property is within the jurisdiction of the State. But the whole scope of that opinion is to show that neither the vehicles of commerce coming within the State, nor the capital of such corporations, is taxable there; but only the property having a *situs* there, as the wharf used for landing passengers and freight. The entire series of decisions to that effect are cited and relied on.

Of course I do not mean to say that either railroad cars or ships are

to be free from taxation, but I do say that they are not taxable by those States in which they are only transiently present in the transaction of their commercial operations. A British ship coming to the harbor of New York from Liverpool ever so regularly and spending half its time (when not on the ocean) in that harbor, cannot be taxed by the State of New York (harbor, pilotage, and quarantine dues not being taxes). So New York ships plying regularly to the port of New Orleans, so that one of the line may be always lying at the latter port, cannot be taxed by the State of Louisiana. (See cases above cited). No more can a train of cars belonging in Pennsylvania, and running regularly from Philadelphia to New York, or to Chicago, be taxed by the State of New York, in the one case, or by Illinois, in the other. If it may lawfully be taxed by these States, it may lawfully be taxed by all the intermediate States, New Jersey, Ohio, and Indiana. And then we should have back again all the confusion and competition and State jealousies which existed before the adoption of the Constitution, and for putting an end to which the Constitution was adopted.

In the opinion of the court it is suggested that if all the States should adopt as equitable a rule of proportioning the taxes on the Pullman Company as that adopted by Pennsylvania, a just system of taxation of the whole capital stock of the company would be the result. Yes, if —! But Illinois may tax the company on its whole capital stock. Where would be the equity then? This, however, is a consideration that cannot be compared with the question as to the power to tax at all, — as to the relative power of the State and general governments over the regulation of internal commerce, — as to the right of the States to resume those powers which have been vested in the government of the United States.

It seems to me that the real question in the present case is as to the *situs* of the cars in question. They are used in interstate commerce, between Pennsylvania, New York, and the Western States. Their legal *situs* no more depends on the States or places where they are carried in the course of their operations than would that of any steamboats employed by the Pennsylvania Railroad Company to carry passengers on the Ohio or Mississippi. If such steamboats belonged to a company located at Chicago, and were changed from time to time as their condition as to repairs and the convenience of the owners might render necessary, is it possible that the States in which they were running and landing in the exercise of interstate commerce could subject them to taxation? No one, I think, would contend this. It seems to me that the cars in question belonging to the Pullman Car Company are in precisely the same category.

## ADAMS EXPRESS COMPANY v. OHIO.

SUPREME COURT OF THE UNITED STATES. 1897.

[*Reported 166 U. S. 194; 166 U. S. 185.*]

THESE are cases involving the constitutionality of certain laws of the State of Ohio providing for the taxation of telegraph, telephone, and express companies, and the validity of assessments of express companies thereunder.

The general assembly of Ohio passed, April 27, 1893, 90 Ohio Laws, 330, an act to amend and supplement §§ 2777, 2778, 2779, and 2780 of the Revised Statutes of that State (commonly styled "The Nichols Law"), which was amended May 10, 1894. The law created a state board of appraisers and assessors, consisting of the auditor of State, treasurer of State, and attorney general, which was charged with the duty of assessing the property in Ohio of telegraph, telephone, and express companies. By the act as amended, between the first and thirty-first days of May annually each telegraph, telephone, and express company doing business in Ohio, was required to file a return with the auditor of State, setting forth among other things the number of shares of its capital stock; the par value and market value (or, if there be no market value, then the actual value) of its shares at the date of the return; a statement in detail of the entire real and personal property of said companies and where located, and the value thereof as assessed for taxation. Telegraph and telephone companies were required to return, also, the whole length of their lines, and the length of so much of their lines as is without and is within the State of Ohio, including the lines controlled and used, under lease or otherwise. Express companies were required to include in the return a statement of their entire gross receipts, from whatever source derived, for the year ending the first day of May, of business wherever done; and of the business done in the State of Ohio, giving the receipts of each office in the State; also the whole length of the lines of rail and water routes over which the companies did business, within and without the State. Provision was made in the law for the organization of the board, for the appointing of one of its members as secretary and the keeping of full minutes of its proceedings. The board was required to meet in the month of June and assess the value of the property of these companies in Ohio. The rule to be followed by the board in making the assessment was that "in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire

property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

As to telegraph and telephone companies, the board was required to apportion the valuation among the several counties through which the lines ran, in the proportion that the length of the lines in the respective counties bore to the entire length in the State; in the case of express companies, the apportionment was to be made among the several counties in which they did business, in the proportion that the gross receipts in each county bore to the gross receipts in the State.

The amount thus apportioned was to be certified to the county auditor, and placed by him on the duplicate "to be assessed, and the taxes thereon collected the same as taxes assessed and collected on other personal property," the rate of taxation to be the same as that on other property in the local taxing district.

The valuation of all the real estate of the companies, situated in Ohio, was required to be deducted from the total valuation, as fixed by the board.

The original suits were brought in the Circuit Court to enjoin the certification of the apportioned valuations to the county auditors, as to 1893, against the state board; as to 1894 and 1895, against the auditor of State.<sup>1</sup>

The appellants filed a petition for a rehearing.

BREWER, J. We have had before us at the present term several cases involving the taxation of the property of express companies, some coming from Ohio, some from Indiana, and one from Kentucky; also a case from the latter State involving the taxation of the property of the Henderson Bridge Company. The Ohio and Indiana cases were decided on the 1st of February. (165 U. S. 194.) Petitions for rehearing of those cases have been presented and are now before us for consideration.

The importance of the questions involved, the close division in this court upon them, and the earnestness of counsel for the express companies in their original arguments, as well as in their briefs on this application, lead those of us who concurred in the judgments to add a few observations to what has hitherto been said.

Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a State to interfere with interstate commerce does not in the least degree abridge the right of a State to tax at their full value all the instrumentalities used for such commerce.

Now the taxes imposed upon express companies by the statutes of the three States of Ohio, Indiana, and Kentucky are certainly not in terms "privilege taxes." They purport to be upon the property of the

<sup>1</sup> Part of the statement of facts, arguments of counsel, and the opinion of the Court upon the first argument, are omitted. — Ed

companies. They are, therefore, not, in form at least, subject to any of the denunciations against privilege taxes which have so often come from this court. The statutes grant no privilege of doing an express business, charge nothing for doing such a business, and contemplate only the assessment and levy of taxes upon the property of the express companies situated within the respective States. And the only really substantial question is whether, properly understood and administered, they subject to the taxing power of the State property not within its territorial limits. The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the State; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.

But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property. Take the simplest illustration: B, a solvent man, purchases from A certain property, and gives to A his promise to pay, say, \$100,000 therefor. Such promise may or may not be evidenced by a note or other written instrument. The property conveyed to B may or may not be of the value of \$100,000. If there be nothing in the way of fraud or misrepresentation to invalidate that transaction, there exists a legal promise on the part of B to pay to A \$100,000. That promise is a part of A's property. It is something of value, something on which he will receive cash, and which he can sell in the markets of the community for cash. It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this intangible property consists — whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which though intangible exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property?

The first question to be considered therefore is whether there is

belonging to these express companies intangible property — property differing from the tangible property — a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man. Take the Henderson Bridge Company's property, the validity of the taxation of which is before us in another case. The facts disclosed in that record show that the bridge company owns a bridge over the Ohio, between the city of Henderson in Kentucky and the Indiana shore, and also ten miles of railroad in Indiana; that that tangible property — that is, the bridge and railroad track — was assessed in the States of Indiana and Kentucky at \$1,277,695.54, such, therefore, being the adjudged value of the tangible property. Thus the physical property could presumably be reproduced by an expenditure of that sum, and if placed elsewhere on the Ohio River, and without its connections or the business passing over it or the franchises connected with it, might not of itself be worth any more. As mere bridge and tracks, that was its value. If the State's power of taxation is limited to the tangible property, the company should only be taxed in the two States for that sum, but it also appears that it, as a corporation, had issued bonds to the amount of \$2,000,000, upon which it was paying interest; that it had a capital stock of \$1,000,000, and that the shares of that stock were worth not less than \$90 per share in the market. The owners, therefore, of that stock had property which for purposes of income and purposes of sale was worth \$2,900,000. What gives this excess of value? Obviously the franchises, the privileges the company possesses — its intangible property.

Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. Suppose such a bridge were entirely within the territorial limits of a State, and it appeared that the bridge itself cost only \$1,277,000, could be reproduced for that sum, and yet it was so situated with reference to railroad or other connections, so used by the travelling public, that it was worth to the holders of it in the matter of income \$2,900,000, could be sold in the markets for that sum, was therefore in the eyes of practical business men of the value of \$2,900,000, can there be any doubt of the State's power to assess it at that sum, and to collect taxes from it upon that basis of value? Substance of right demands that whatever be the real value of any property, that value may be accepted by the State for purpose of taxation, and this ought not to be evaded by any mere confusion of words. Suppose an express company is incorporated to transact business within the limits of a State, and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that State, so uses the tangible



property which it possesses, so transacts business therein that its stock becomes in the markets of the State of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation.

A distinction must be noticed between the construction of a State law and the power of a State. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the State comprehends all property in its scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges, and good will of the concern.

Now, the same reality of the value of its intangible property exists when a company does not confine its work to the limits of a single State. Take, for instance, the Adams Express Company. According to the return filed by it with the auditor of the State of Ohio, as shown in the records of these cases, its number of shares was 120,000, the market value of each \$140 to \$150. Taking the smaller sum, gives the value of the company's property taken as an entirety as \$16,800,000. In other words, it is worth that for the purposes of income to the holders of the stock and for purposes of sale in the markets of the land. But in the same return it shows that the value of its real estate in Ohio was only \$25,170; of real estate owned outside of Ohio, \$3,005,157.52; or a total of \$3,030,327.52; the value of its personal property in Ohio, \$42,065; of personal property outside of Ohio, \$1,117,426.05; or a total of \$1,159,491.05, making a total valuation of its tangible property \$4,189,818.57, and upon that basis it insists that taxes shall be levied. But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale \$16,800,000, to be adjudged liable for taxation only upon one fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.

It is suggested that the company may have bonds, stocks, or other

investments which produce a part of the value of its capital stock, and which have a special situs in other States or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth \$16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, or invested in any way outside the business of the company and so as to be subject to purely local taxation, let that fact be disclosed, and then if the State of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That if such facts exist they must be taken into consideration by a State in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court. *Pittsburgh, Cincinnati, etc. Railway Co. v. Backus*, 154 U. S. 421, 443; *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 23; *Adams Express Co. v. Ohio*, 165 U. S. 194, 227. Presumably all that a corporation has is used in the transaction of its business, and if it has accumulated assets which for any reason affect the question of taxation, it should disclose them. It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the State treats its property as all taxable.

But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers \$4,000,000 of tangible property scattered through different States, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of \$16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of \$12,000,000, and its tangible property of only \$4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every State within which it is transacting business and where it has its property, more or less, may rightfully say that the \$16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the State which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property, and this State contributes to that aggregate value not merely

the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the States other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those States, but unable to transact the express business within their limits, that \$12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.

It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was "*mobilia personam sequuntur*," but that maxim was never of universal application, and seldom interfered with the right of taxation. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22. It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of \$12,000,000 of intangible property for purposes of taxation was changed from the State of New York to that of New Jersey.

It is also true that a corporation is, for purposes of jurisdiction in the Federal courts, conclusively presumed to be a citizen of the State which created it, but it does not follow therefrom that its franchise to be is for all purposes to be regarded as confined to that State. For the transaction of its business it goes into various States, and wherever it goes as a corporation it carries with it that franchise to be. But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done. The Southern Pacific Railway Company is a corporation chartered by the State of Kentucky, yet within the limits of that State it is said to have no tangible property and no office for the transaction of business. The vast amount of tangible property which by lease or otherwise it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the States and Territories on the Pacific Slope. Do not these intangible properties—these franchises to do—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every State in which that tangible property is found?

It is said that the views thus expressed open the door to possibilities of gross injustice to these corporations, through the conflicting action of the different States in matters of taxation. That may be so, and the courts may be called upon to relieve against such abuses. But such possibilities do not equal the wrong which sustaining the contention of the appellant would at once do. In the city of New York are

located the headquarters of a corporation, whose corporate property is confessedly of the value of \$16,000,000—a value which can be realized by its stockholders at any moment they see fit. Its tangible property and its business is scattered through many States, all whose powers are invoked to protect its property from trespass and secure it in the peaceful transaction of its widely dispersed business. Yet because that tangible property is only \$4,000,000 we are told that that is the limit of the taxing power of these States. In other words, it asks these States to protect property which to it is of the value of \$16,000,000, but is willing to pay taxes only on the basis of a valuation of \$4,000,000. The injustice of this speaks for itself.

In conclusion, let us say that this is eminently a practical age: that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no finespun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires.

The petition for a rehearing is

*Denied.*

WHITE, J. (with whom were FIELD, HARLAN, and BROWN, JJ.), dissenting.<sup>1</sup>

It is elementary that the taxing power of one government cannot be lawfully exerted over property not within its jurisdiction or territory and within the territory and jurisdiction of another. The attempted exercise of such power would be a clear usurpation of authority, and involve a denial of the most obvious conceptions of government. This rule, common to all jurisdictions, is peculiarly applicable to the several States of the Union, as they are by the Constitution confined within the orbit of their lawful authority, which they cannot transcend without destroying the legitimate powers of each other, and, therefore, without violating the Constitution of the United States.

In assessing the actual intrinsic value of tangible property of express companies in the State of Ohio it was the duty of the assessing board to add to such value a proportionate estimate of the capital stock, so as thereby to assess not only the tangible property within the State, but also along with such property a part of the entire capital stock of the corporation, without reference to its domicile, and equally without reference to the situation of the property and assets owned by the company from which alone its capital stock derives value. In other words, although actual property situated in States other than Ohio may not be assessed in that State, yet that it may take all the value of the property in other States and add such portion thereof, as it sees fit, to the assessment in Ohio, and that this process of taxation of property

<sup>1</sup> This opinion was delivered upon the first argument. Part of it only is given.  
—ED.

in other States, in violation of the Constitution, becomes legal provided only it is called taxation of property within the State.

If the rule contended for by the State of Ohio be true, why would it not apply to a corporation, partnership, or individual engaged in the dry goods business or any other business having branches in various States? Would it not be as proper to say of such agencies, as it is of the agencies of express companies, that there is an intellectual unity of earnings between the main establishment and all such agencies, and therefore a right to assess goods found in an agency with relation to the capital and wealth of the original house and all the other branches situated in other States? Take the case of a merchant carrying on a general commercial business in one State and having connections of confidence and credit with another merchant of great capital in another State. If this rule be true, can it not also be said that such merchant derives advantages in his business from the sum of the capital in other States which may be availed of to extend his credit and his capacity to do business, and that therefore his tangible property must be valued accordingly? Suppose bankers in Boston, Philadelphia, and New York of great wealth, owning stocks and bonds of various kinds, send representatives to New Orleans with a limited sum of money there to commence business. These representatives rent offices and buy office furniture. Is it not absolutely certain that the business of those individuals would be largely out of proportion to the actual capital possessed by them, because of the fact that reflexly and indirectly their business and credit is supported by the home offices? In this situation, the assessor comes for their tax return. He finds noted thereon only a limited sum of money and the value of the office furniture. What is to prevent that official under the rule of supposed metaphysical or intellectual unity between property from saying: "It is true you have but a small tangible capital, and your office furniture is only worth \$250, but the value of property is in its use, and as you have various elements of wealth situated in the cities named, I will assess your property because of its use at a million dollars"? Such conduct would be exactly in accord with the power of taxation which it is here claimed the State of Ohio possesses, and which, as I understand it, the court now upholds. To give the illustrations, I submit, is to point to the confusion, injustice, and impossibility of such a rule.

## NEW ORLEANS v. STEMPEL.

SUPREME COURT OF THE UNITED STATES. 1899.

[Reported 175 *United States*, 309.]

BREWER, J.<sup>1</sup> This case came on appeal from the Circuit Court of the United States for the Eastern District of Louisiana. It is a suit brought by the appellee to restrain the collection of taxes levied upon certain personal property which she claims was exempt from taxation. . . . The assessment . . . was of \$15,000 "money in possession, on deposit, or in hand," and of \$800,000 "money loaned on interest, all credits and all bills receivable, for money loaned or advanced, or for goods sold; and all credits of any and every description." . . .

Under the circumstances disclosed by the testimony, were the money and credits subject to taxation? It appears that these credits were evidenced by notes largely secured by mortgages on real estate in New Orleans; that these notes and mortgages were in the city of New Orleans, in possession of an agent of the plaintiff, who collected the interest and principal as it became due, and deposited the same in a bank in New Orleans to the credit of the plaintiff. The question, therefore, is distinctly presented whether, because the owners were domiciled in the State of New York, the moneys so deposited in a bank within the limits of the State of Louisiana, and the notes secured by mortgages situated and held as above described, were free from taxation in the latter State. Of course there must be statutory warrant for such taxation; for if the legislature omits any property from the list of taxables, the courts are not authorized to correct the omission and adjudge the omitted property to be subject to taxation.<sup>2</sup>

From this review of the decisions of the Supreme Court of the State, it is obvious that moneys, such as those referred to, collected as interest and principal of notes, mortgages, and other securities kept within the State, and deposited in one of the banks of the State for use or reinvestment, are taxable under the act of 1890. They are property arising from business done in the State; they were tangible property when received by the agent of the plaintiffs, and as such subject to taxation, and their taxability was not, as the court holds, lost by their mere deposit in a bank. It is true that when deposited the moneys became the property of the bank, and for most purposes the relation of debtor and creditor arose between the bank and the depositor; yet, as evidently the moneys were to be kept in the State for

<sup>1</sup> Part of the opinion is omitted. — Ed.

<sup>2</sup> The court here cited *Acts La. 1890, c. 121*; *Liverpool, etc. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760; *Railley v. Board of Assessors*, 44 La. Ann. 765; *Clason v. New Orleans*, 46 La. Ann. 1; *Bluefield Banana Co. v. Board of Assessors*, 49 La. Ann. 43; *Parker v. Strauss*, 49 La. Ann. 1173; *London & Liverpool Ins. Co. v. Board of Assessors*, 51 La. Ann. 1028. — Ed.

reinvestment or other use, they remained still subject to taxation, according to the decision in 49 La Ann. 43. With regard to the notes and mortgages, it may be conceded that there is no express decision of the Supreme Court to the effect that they were taxable under the law of 1890; yet the reasoning of that court in several cases and its declarations, although perhaps only dicta, show that clearly in its judgment they had a local situs within the State, and were by the statute of 1890 subject to taxation.

When the question is whether property is exempt from taxation, and that exemption depends alone on a true construction of a statute of the State, the Federal courts should be slow to declare an exemption in advance of any decision by the courts of the State. The rule in such a case is that the Federal courts follow the construction placed upon the statute by the State courts, and in advance of such construction they should not declare property beyond the scope of the statute and exempt from taxation unless it is clear that such is the fact. In other words, they should not release any property within the State from its liability to State taxation unless it is obvious that the statutes of the State warrant such exemption, or unless the mandates of the Federal Constitution compel it.

If we look to the decisions of other States, we find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage, or other written instrument, and that written instrument evidencing the indebtedness is left within the State in the hands of an agent of the non-resident owner, to be by him used for the purposes of collection and deposit or reinvestment within the State, its taxable situs is in the State. See *Catlin v. Hull*, 21 Vt. 152, in which the rule was thus announced (pages 159, 161):—

“It is undoubtedly true that, by the generally acknowledged principles of public law, personal chattels follow the person of the owner, and that upon his death they are to be distributed according to the law of his domicile; and, in general, any conveyance of chattels good by the law of his own domicile will be good elsewhere. But this rule is merely a legal fiction, adopted from considerations of general convenience and policy for the benefit of commerce, and to enable persons to dispose of their property at their decease agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country where the same is situated. But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country where the property is in fact which contravenes the law of his domicile; for if there is, the law of the owner's domicile must yield to the law of the State where the property is in fact situate.”

“We are not only satisfied that this method of taxation is well founded in principle and upon authority, but we think it entirely just and equitable that, if persons residing abroad bring their property and

invest it in this State, for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it."

In *Goldgart v. People*, 106 Ill. 25, 28, the court said:—

"If the owner is absent, but the credits are in fact here, in the hands of an agent, for renewal or collection, with the view of reloading the money by the agent as a permanent business, they have a situs here for the purpose of taxation, and there is jurisdiction over the thing."

In *Wilcox v. Ellis*, 14 Kan. 588, the power of the State to tax a citizen and resident of Kansas, on money due him in Illinois, evidenced by a note which was left in Illinois for collection, was denied, the court saying (p. 603), after referring to the maxim, *mobilia sequuntur personam*:—

"This maxim is at most only a legal fiction; and Blackstone, speaking of legal fictions, says: 'This maxim is invariably observed, that no fiction shall extend to work an injury, its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.' 3 Blackstone Com. 43. Now, as the State of Illinois, and not Kansas, must furnish the plaintiff with all the remedies that he may have for the enforcement of all his rights connected with said notes, debts, etc., it would seem more just, if said debt is to be taxed at all, that the State of Illinois, and not Kansas, should tax it, and that we should not resort to legal fictions to give the State of Kansas the right to tax it."

The same doctrine was affirmed in *Fisher v. Commissioners of Rush County*, 19 Kan. 414, and again in *Blain v. Irby*, 25 Kan. 499, 501, in which the court said, referring to promissory notes: "They have such an independent situs that they may be taxed where they are situated."

The decisions of the highest courts of New York, in which State these plaintiffs reside, are to the same effect. In *People v. Trustees*, 48 N. Y. 390, 397, the court said:—

"That the furniture in the mansion and the money in the bank were, under these provisions, properly assessable to the relators is not seriously disputed. And I am unable to see why the money due upon the land contracts must not be assessed in the same way. The debts due upon these contracts are personal estate, the same as if they were due upon notes or bonds; and such personal estate may be said to exist where the obligations for payment are held. Notes, bonds, and other contracts for the payment of money have always been regarded and treated in the law as personal property. They represent the debts secured by them. They are the subject of larceny, and a transfer of them transfers the debt. If this kind of property does not exist where the obligation is held, where does it exist? It certainly does not exist where the debtor may be and follow his person. And while, for some purposes in the law, by legal fiction, it follows the person of the cred-



itor and exists where he may be, yet it has been settled that, for the purpose of taxation, this legal fiction does not, to the full extent, apply, and that such property belonging to a non-resident creditor may be taxed in the place where the obligations are held by his agent. *Hoyt v. Commissioners of Taxes*, 23 N. Y. 238; *The People v. Gardner*, 51 Barb. 352; *Catlin v. Hull*, 21 Vt. 152."

This proposition was reaffirmed in *People ex rel. v. Smith*, 88 N. Y. 576, in which the Court of Appeals of that State held that a resident of New York was not liable to taxation on moneys loaned in the States of Wisconsin and Minnesota on notes and mortgages, which notes and mortgages were held in those States for collection of principal and interest and reinvestment of the funds, it appearing that property so situated within the limits of those States was there subject to taxation. See also *Missouri v. St. Louis County Court*, 47 Mo. 594, 600; *People v. Home Insurance Company*, 28 Cal. 533; *Billinghurst v. Spink County*, 5 S. Dak. 84, 98; *In re Jefferson*, 35 Minn. 215; *Poppleton v. Yambill County*, 18 Ore. 377; *Redmond v. Commissioners*, 87 N. C. 122; *Finch v. York County*, 19 Neb. 50.

With reference to the decisions of this court, it may be said that there has never been any denial of the power of a State to tax securities situated as these are, while there have been frequent recognitions of its power to separate for purposes of taxation the situs of personal property from the domicile of the owner. In *State Tax on Foreign-held Bonds*, 15 Wall. 300, it was held that while the taxing power of the State may extend to property within its territorial limits, it cannot to that which is outside those limits; and, therefore, that bonds issued by a railroad company, although secured by a mortgage on property within the State, were not subject to taxation while in the possession of their owners who were non-residents, the court saying: "We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State." But in the same case, on page 323, the court declared: "It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions. The former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners."

This last sentence, properly construed, is not to be taken as a denial

of the power of the legislature to establish an independent *situs* for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their *situs* to be that of the domicile of the owner, a declaration which the legislature has no power to disturb when in fact they are in his possession. It was held in that case that a statute requiring the railroad company, the obligor in such bonds, to pay the State tax, and authorizing it to deduct the amount of such taxation from the interest due by the terms of the bond, was, as to non-residents, a law impairing the obligation of contracts. The same proposition was affirmed in *Murray v. Charleston*, 96 U. S. 432, where the city of Charleston attempted to tax its obligations held by non-residents of the State. In *Tappan v. Merchants' National Bank*, 19 Wall. 490, the ruling was, that although shares of stock in national banks were in a certain sense intangible and incorporeal personal property, the law might separate them from the persons of their owners for purposes of taxation, and give them a *situs* of their own. See also *Pullman's Car Company v. Pennsylvania*, 141 U. S. 18, 22, where the question of the separation of personal property from the person of the owner for purposes of taxation was discussed at length; as also the case of *Savings Society v. Multnomah County*, 169 U. S. 421, 427, in which a statute of Oregon taxing the interest of a mortgagee in real estate was adjudged valid, although the owner of the mortgage was a non-resident. Nor is there anything in the case of *Kirtland v. Hotchkiss*, 100 U. S. 491, conflicting with these decisions. It was there held that a State might tax one of its citizens on bonds belonging to him, although such bonds were secured by mortgage on real estate situated in another State. It was assumed that the *situs* of such intangible property as a debt evidenced by bond was at the domicile of the owner. There was no legislation attempting to set aside that ordinary rule in respect to the matter of *situs*. On the contrary, the legislature of the State of Connecticut, from which the case came, plainly reaffirmed the rule, and the court in its opinion summed up the case in these words (p. 499): "Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States) is a matter which concerns only the people of that State, with which the Federal government cannot rightfully interfere."

This matter of *situs* may be regarded in another aspect. In the absence of statute, bills and notes are treated as choses in action, and are not subject to levy and sale on execution; but by the statutes of many States they are made so subject to seizure and sale as any tangible personal property. 1 Freeman on Executions, s. 112; 4 Am. & Eng. E. of L., 2d ed., 282; 11 Am. & Eng. E. of L., 2d ed., 623.

Among the States referred to in these authorities as having statutes warranting such levy and sale are California, Indiana, Kentucky, New York, Tennessee, Iowa, and Louisiana. *Brown v. Anderson*, 4 Martin (N. S.), 416, affirmed the rightfulness of such a levy and sale. In *Fluker v. Bullard*, 2 La. Ann. 338, it was held that if a note was not taken into the actual possession of the sheriff, a sale by him on an execution conveyed no title on the purchaser, the court saying: "In the case of *Simpson v. Allain*, it was held that, in order to make a valid seizure of tangible property, it is necessary that the sheriff should take the property levied upon into actual possession. 7 Rob. 504. In the case of *Gobeau v. The New Orleans & Nashville Railroad Company*, the same doctrine is still more distinctly announced. The court there says: 'From all the different provisions of our laws above referred to, can it be controverted that, in order to have them carried into effect, the sheriff must necessarily take the property seized into his possession? This is the essence of the seizure. It cannot exist without such possession.' 6 Rob. 348. It is clear, under these authorities, that the sheriff effected no seizure of the note in controversy, and consequently his subsequent adjudication of it conferred no title on Bailey."

The same doctrine was reaffirmed in *Stockton v. Stanbrough*, 3 La. Ann. 390. Now, if property can have such a situs within the State as to be subject to seizure and sale on execution, it would seem to follow that the State has power to establish a like situs within the State for purposes of taxation.

It has also been held that a note may be made the subject of seizure and delivery in a replevin suit. *Graff v. Shannon*, 7 Iowa, 508; *Smith v. Eals*, 81 Iowa, 235; *Pritchard v. Norwood*, 155 Mass. 539.

It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay. — evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation.

It follows from these considerations that

*The decree of the Circuit Court must be reversed and the case remanded for further proceedings.*<sup>1</sup>

HARLAN and WHITE, JJ., dissenting.

<sup>1</sup> *Acc.* *Bristol v. Washington County*, 177 U. S. 133; *Walker v. Jack*, 88 Fed. 576; *P. v. Home Ins. Co.*, 29 Cal. 533; *In re Jefferson*, 35 Minn. 217; *S. v. Bentley*, 23 N. J. L. 532. See *Herron v. Keeran*, 59 Ind. 472. — ED.

BLACKSTONE *v.* MILLER.

SUPREME COURT OF THE UNITED STATES. 1903.

[*Reported* 188 U. S. 189.]

HOLMES, J. This is a writ of error to the Surrogate's Court of the county of New York. It is brought to review a decree of the court, sustained by the Appellate Division of the Supreme Court, 69 App. Div. 127, and by the Court of Appeals, 171 N. Y. 682, levying a tax on the transfer by will of certain property of Timothy B. Blackstone, the testator, who died domiciled in Illinois. The property consisted of a debt of \$10,692.24, due to the deceased by a firm, and of the net sum of \$4,843,456.72, held on a deposit account by the United States Trust Company of New York. The objection was taken seasonably upon the record that the transfer of this property could not be taxed in New York consistently with the Constitution of the United States.

The deposit in question represented the proceeds of railroad stock sold to a syndicate and handed to the Trust Company, which, by arrangement with the testator, held the proceeds subject to his order, paying interest in the meantime. Five days' notice of withdrawal was required, and if a draft was made upon the company, it gave its check upon one of its banks of deposit. The fund had been held in this way from March 31, 1899, until the testator's death on May 26, 1900. It is probable, of course, that he did not intend to leave the fund there forever and that he was looking out for investments, but he had not found them when he died. The tax is levied under a statute imposing a tax "upon the transfer of any property, real or personal. . . . 2. When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death." Laws of 1896, c. 908, § 220, amended, Laws of 1897, c. 284; 3 Birdseye's Stat. 3d ed. 1901, p. 3592. The whole succession has been taxed in Illinois, the New York deposit being included in the appraisal of the estate. It is objected to the New York tax that the property was not within the State, and that the courts of New York had no jurisdiction; that if the property was within the State it was only transitorily there, *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, 599, 600, that the tax impairs the obligation of contracts, that it denies full faith and credit to the judgment taxing the inheritance in Illinois, that it deprives the executrix and legatees of privileges and immunities of citizens of the State of New York, and that it is contrary to the Fourteenth Amendment.

In view of the State decisions it must be assumed that the New York statute is intended to reach the transfer of this property if it can be reached. *New Orleans v. Stempel*, 175 U. S. 309, 316; *Morley v. Lake Shore & Michigan Southern Railway Co.*, 146 U. S. 162, 166. We also must take it to have been found that the property was not *in*

*transitu* in such a sense as to withdraw it from the power of the State, if otherwise the right to tax the transfer belonged to the State. The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year, so that this finding at least was justified. *Kelley v. Rhoads*, 188 U. S. 1, and *Diamond Match Co. v. Village of Ontonagon*, 188 U. S. 84, present term. Both parties agree with the plain words of the law that the tax is a tax upon the transfer, not upon the deposit, and we need spend no time upon that. Therefore the naked question is whether the State has a right to tax the transfer by will of such deposit.

The answer is somewhat obscured by the superficial fact that New York, like most other States, recognizes the law of the domicile as the law determining the right of universal succession. The domicile, naturally, must control a succession of that kind. Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important. To a considerable, although more or less varying, extent, the succession determined by the law of the domicile is recognized in other jurisdictions. But it hardly needs illustration to show that the recognition is limited by the policy of the local law. Ancillary administrators pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domicile. The title of the principal administrator, or of a foreign assignee in bankruptcy, another type of universal succession, is admitted in but a limited way or not at all. See *Crapo v. Kelly*, 16 Wall. 610; *Chipman v. Manufacturers' National Bank*, 156 Mass. 147, 148, 149.

To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession tax there. *Eidman v. Martinez*, 184 U. S. 578, 586, 587, 592. See *Mager v. Grima*, 8 How. 490, 493; *Coe v. Errol*, 116 U. S. 517, 524; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; and for state decisions *Matter of Estate of Romaine*, 127 N. Y. 80; *Callahan v. Woodbridge*, 171 Mass. 593; *Greves v. Shaw*, 173 Mass. 205; *Allen v. National State Bank*, 92 Md. 509.

No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at

the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law. *Coe v. Errol*, 116 U. S. 517, 524; *Knowlton v. Moore*, 178 U. S. 41.

The question, then, is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. *Matter of Hondayer*, 150 N. Y. 37; *New Orleans v. Stempel*, 175 U. S. 209, 316; *City National Bank v. Charles Baker Co.*, 180 Mass. 40, 42. In view of these cases, and the decision in the present case, which followed them, a not very successful attempt was made to show that by reason of the facts which we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank. We shall not stop to discuss this aspect of the case, because we prefer to decide it upon a broader view.

If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. *United States v. Perkins*, 163 U. S. 625, 628, 629; *McCulloch v. Maryland*, 4 Wheat. 316, 429. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, Rock Island & Pacific Ry. Co. v. Sturm*, 174 U. S. 710. See *Wyman v. Halstead*, 109 U. S. 654. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one

case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way.

There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds*, 15 Wall. 300. The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass. 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases. *Savings & Loan Society v. Multnomah County*, 169 U. S. 421, 428; *New Orleans v. Stempel*, 175 U. S. 309, 319, 320.

In the case at bar the law imposing the tax was in force before the deposit was made, and did not impair the obligation of the contract, if a tax otherwise lawful ever can be said to have that effect. *Pinney v. Nelson*, 183 U. S. 144, 147. The fact that two States, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Coe v. Errol*, 116 U. S. 517, 524; *Knowlton v. Moore*, 178 U. S. 53. The universal succession is taxed in one State, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money. See *Adams v. Batchelder*, 173 Mass. 258. The same considerations answer the argument that due faith and credit are not given to the judgment in Illinois. The tax does not deprive the plaintiff in error of any of the privileges and immunities of the citizens of New York. It is no such deprivation that if she had lived in New York the tax on the transfer of the deposit would have been part of the tax on the inheritance as a whole. See *Mager v. Grima*, 8 How. 490; *Brown v. Houston*, 114 U. S. 622, 635; *Wallace v. Myers*, 38 Fed. Rep. 184. It does not violate the Fourteenth Amendment. See *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283. Matters of state procedure and the correctness of the New York decree or judgment, apart from specific constitutional objections, are not open here. As we have said, the question whether the property was to be regarded as *in transitu*, if material, must be regarded as found against the plaintiff in error.

*Decree affirmed.*

MR. JUSTICE WHITE dissents.

## UNION TRANSIT CO. v. KENTUCKY.

SUPREME COURT OF THE UNITED STATES. 1905.

[Reported 199 U. S. 194.]

BROWN, J. In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, permanently located in other States, and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the Fourteenth Amendment.

Section 4020 of the Kentucky statutes, under which this assessment was made, provides that "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, . . . shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

That the property taxed is within this description is beyond controversy. The constitutionality of the section was attacked not only upon the ground that it denied to the Transit Company due process of law, but also the equal protection of the laws, in the fact that railroad companies were only taxed upon the value of their rolling stock used within the State which was determined by the proportion which the number of miles of the railroad in the State bears to the whole number of miles operated by the company.

The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. *Railroad Company v. Jackson*, 7 Wall. 262; *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Tappan v. Merchants' National Bank*, 19 Wall. 490, 499; *Delaware &c. R. R. Co. v. Pennsylvania*, 198 U. S. 341, 358. In *Chicago &c. R. R. Co. v. Chicago*, 166 U. S. 226, it was held, after full consideration, that the taking of private property without compensation was a denial of due



process within the Fourteenth Amendment. See also *Davidson v. New Orleans*, 96 U. S. 97, 102; *Missouri Pacific Railway v. Nebraska*, 164 U. S. 403, 417; *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 519.

Most modern legislation upon this subject has been directed (1) to the requirement that every citizen shall disclose the amount of his property subject to taxation and shall contribute in proportion to such amount: and (2) to the avoidance of double taxation. As said by Adam Smith in his "Wealth of Nations," Book V., Ch. 2, Pt. 2, "the subjects of every State ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities: that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interest in the estate. In the observation or neglect of this maxim consists what is called equality or inequality of taxation."

But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. *Kelly v. Pittsburgh* 104 U. S. 78; *Amesbury Nail Factory Co. v. Weed*, 17 Mass. 53; *Thomas v. Gay*, 169 U. S. 264; *Louisville & C. R. R. Co. v. Barber Asphalt Co.* 197 U. S. 430. Subject to these individual exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. *Norwood v. Baker*, 172 U. S. 269. It is often said protection and payment of taxes are correlative obligations.

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know

of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. It is said by this court in the Foreign-held Bond Case, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in *Louisville &c. Ferry Co. v. Kentucky*, 188 U. S., 385, 396: "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government." See also *McCulloch v. Maryland*, 4 Wheat. 316, 429; *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 599; *St. Louis v. Ferry Co.*, 11 Wall. 423, 429, 431; *Morgan v. Parham*, 16 Wall. 471, 476.

Respecting this, there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicile of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such has been the repeated rulings of this court. *Tappan v. Merchants' National Bank*, 19 Wall. 490; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Bonaparte v. Tax Court*, 104 U. S. 592; *Sturgis v. Carter*, 114 U. S. 511; *Kidd v. Alabama*, 188 U. S. 730; *Blackstone v. Miller*, 188 U. S. 189.

If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicile or the *situs*. Of course, we do not enter into a consideration of the question, so much discussed by polit-

ical economists, of the double taxation involved in taxing the property from which these securities arise, and also the burdens upon such property, such as mortgages, shares of stock and the like — the securities themselves.

The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs*, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicile of the owner. We have, ourselves, held in a number of cases that such property permanently located in a State other than that of its owner is taxable there. *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Railroad Company v. Peniston*, 18 Wall. 5; *American Refrigerator Transit Company v. Hall*, 174 U. S. 70; *Pittsburgh Coal Company v. Bates*, 156 U. S. 577; *Old Dominion Steamship Company v. Virginia*, 198 U. S. 299. We have also held that, if a corporation be engaged in running railroad cars into, through, and out of the State, and having at all times a large number of cars within the State, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run. *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18.

There are doubtless cases in the State reports announcing the principle that the ancient maxim of *mobilia sequuntur personam* still applies to personal property, and that it may be taxed at the domicile of the owner, but upon examination they all or nearly all relate to intangible property, such as stocks, bonds, notes, and other choses in action. We are cited to none applying this rule to tangible property, and after a careful examination have not been able to find any wherein the question is squarely presented, unless it be that of *Wheaton v. Mickel*, 63 N. J. Law, 525, where a resident of New Jersey was taxed for certain coastwise and seagoing vessels located in Pennsylvania. It did not appear, however, that they were permanently located there. The case turned upon the construction of a State statute, and the question of constitutionality was not raised. If there are any other cases holding that the maxim applies to tangible personal property, they are wholly exceptional, and were decided at a time when personal property was comparatively of small amount, and consisted principally of stocks in trade, horses, cattle, vehicles, and vessels engaged in navigation. But in view of the enormous increase of such property since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and correlatively to exempt at the domicile of

its owner. The cases in the State reports upon this subject usually turn upon the construction of local statutes granting or withholding the right to tax extra-territorial property, and do not involve the constitutional principle here invoked. Many of them, such, for instance, as *Blood v. Sayre*, 17 Vt. 609; *Preston v. Boston*, 12 Pickering, 7; *Pease v. Whitney*, 8 Mass. 93; *Gray v. Kettel*, 12 Mass. 161, turn upon the taxability of property where the owner is located in one, and the property in another, of two jurisdictions within the same State, sometimes even involving double taxation, and are not in point here.

One of the most valuable of the State cases is that of *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224, where, under the New York statute, it was held that the tangible property of a resident actually situated in another State or country was not to be included in the assessment against him. The statute declared that "all lands and all personal estate within this State" were liable for taxation, and it was said in a most instructive opinion by Chief Justice Comstock that the language could not be obscured by the introduction of a legal fiction about the *situs* of personal estate. It was said that this fiction involved the necessary consequence that "goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad;" and that the maxim *mobilia sequuntur personam* may only be resorted to when convenience and justice so require. The proper use of legal fiction is to prevent injustice, according to the maxim "*in fitione juris semper æquitas existat.*" See *Eidman v. Martinez*, 184 U. S. 578; *Blackstone v. Miller*, 188 U. S. 189, 206. "No fiction," says Blackstone, "shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, which might result from a general rule of law." The opinion argues with great force against the injustice of taxing extra-territorial property, when it is also taxable in the State where it is located. Similar cases to the same effect are *People v. Smith*, 88 N. Y. 576; *City of New Albany v. Meekin*, 3 Indiana, 481; *Wilkey v. City of Pekin*, 19 Illinois, 160; *Johnson v. Lexington*, 14 B. Monroe, 521; *Catlin v. Hull*, 21 Vermont, 152; *Nashua Bank v. Nashua*, 46 N. H. 389.

In *Weaver's Estate v. State*, 110 Iowa, 328, it was held by the Supreme Court of Iowa that a herd of cattle within the State of Missouri belonging to a resident of Iowa, was not subject to an inheritance tax upon his decease. In *Commonwealth v. American Dredging Company*, 122 Penna. St. 386, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained outside of the state. It was said that the non-taxability of tangible personal property located permanently outside of the State was not "because of the technical principle that the *situs* of personal property is where the domicile of the owner is found. This rule is doubtless true as to intangible property, such as bonds, mortgages, and

other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property permanently located in another State. In such cases it is taxable within the jurisdiction where found, and is exempt at the domicile of the owner." The property in that case, however, was held not to be permanently outside of the State, and therefore not exempt from taxation. The rule, however, seems to be well settled in Pennsylvania that so much of the tangible property of a corporation as is situated in another State, and there employed in its corporate business, is not taxable in Pennsylvania. *Commonwealth v. Montgomery &c. Mining Co.*, 5 Pa. County Courts Rep. 89; *Commonwealth v. Railroad Co.*, 145 Pa. St. 96; *Commonwealth v. Westinghouse Mfg. Co.*, 151 Pa. St. 265; *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119. The rule is the same in New York. *Pacific Steamship Company v. Commissioners*, 46 How. Pr. 315.

But there are two recent cases in this court which we think completely cover the question under consideration and require the reversal of the judgment of the State court. The first of these is that of the *Louisville &c. Ferry Co. v. Kentucky*, 188 U. S. 385. That was an action to recover certain taxes imposed upon the corporate franchise of the defendant company, which was organized to establish and maintain a ferry between Kentucky and Indiana. The defendant was also licensed by the State of Indiana. We held that the fact that such franchise had been granted by the Commonwealth of Kentucky did not bring within the jurisdiction of Kentucky for the purpose of taxation the franchise granted to the same company by Indiana, and which we held to be an incorporeal hereditament derived from and having its legal *situs* in that State. It was adjudged that such taxation amounted to a deprivation of property without due process of law, in violation of the Fourteenth Amendment, as much so as if the State taxed the land owned by that company; and that the officers of the State had exceeded their power in taxing the whole franchise without making a deduction for that obtained from Indiana, the two being distinct, "although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways."

The other and more recent case is that of the *Delaware &c. Railroad Co. v. Pennsylvania*, 198 U. S. 341. That was an assessment upon the capital stock of the railroad company, wherein it was contended that the assessor should have deducted from the value of such stock certain coal mined in Pennsylvania and owned by it, but stored in New York, there awaiting sale, and beyond the jurisdiction of the commonwealth at the time appraisement was made. This coal was taxable, and in fact was taxed in the State where it rested for the purposes of sale at the time when the appraisement in question was made. Both this court and the Supreme Court of Pennsylvania had held that a tax on the corporate stock is a tax on the assets of the corporation

issuing such stock. The two courts agreed in the general proposition that tangible property permanently outside of the State, and having no *situs* within the State, could not be taxed. But they differed upon the question whether the coal involved was permanently outside of the State. In delivering the opinion it was said: "However temporary the stay of the coal might be in the particular foreign States where it was resting at the time of the appraisalment, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign States for purposes of taxation, and in truth it was there taxed. We regard this tax as in substance and in fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the State which thus assumes to tax it." The decision in that case was really broader than the exigencies of the case under consideration required, as the tax was not upon the personal property itself, but upon the capital stock of a Pennsylvania corporation, a part of which stock was represented by the coal, the value of which was held should have been deducted.

The adoption of a general rule that tangible personal property in other States may be taxed at the domicile of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other States or even in foreign countries, of stocks of goods and merchandise kept at branch establishments when already taxed at the State of their *situs*, but of that enormous mass of personal property belonging to railways and other corporations which might be taxed in the state where they are incorporated, though their charters contemplated the construction and operation of roads wholly outside the State, and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection. The propriety of such incorporations, where no business is done within the State, is open to a grave doubt, but it is possible that legislation alone can furnish a remedy.

Our conclusion upon this branch of the case renders it unnecessary to decide the second question, viz: Whether the Transit Company was denied the equal protection of the laws.

It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same State, which are controlled by different considerations.

We are of opinion that the cars in question, so far as they were located and employed in other States than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

MR. JUSTICE WHITE concurred in the result.

MR. JUSTICE HOLMES: It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment, and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed.

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NEW YORK CENTRAL RAILROAD *v.* MILLER.

SUPREME COURT OF THE UNITED STATES. 1906.

[Reported 202 *U. S.* 584.]

HOLMES, J. These cases arise upon writs of certiorari, issued under the State law and addressed to the State comptroller for the time being, to revise taxes imposed upon the relator for the years 1900, 1901, 1902, 1903 and 1904 respectively. The tax was levied under New York Laws of 1896, c. 908, § 182, which, so far as material, is as follows: "Franchise Tax on Corporations. — Every corporation . . . incorporated . . . under . . . law in this State, shall pay to the State treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this State and upon each dollar of such amount," at a certain rate, if the dividends amount to six per cent or more upon the par value of such capital stock. "If such dividend or dividends amount to less than six per centum on the par value of the capital stock [as was the case with the relator], the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this State bears to the entire capital of the corporation." It is provided further by the same section that every foreign corporation, etc., "shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital employed by it within this State."

The relator is a New York corporation owning or hiring lines without as well as within the State, having arrangements with other carriers for through transportation, routing and rating, and sending its cars to points without as well as within the State, and over other lines as well as its own. The cars often are out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they return to the relator or the State. In short, by the familiar course of railroad business a considerable proportion of the relator's cars constantly is out of the State, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the State. This contention the comptroller disallowed.

The writ of certiorari in the earliest case, No. 81, with the return setting forth the proceedings of the comptroller, Knight, and the evidence

given before him, was heard by the Appellate Division of the Supreme Court, and a reduction of the amount of the tax was ordered. 75 App. Div. 169. On appeal the Court of Appeals ordered the proceedings to be remitted to the comptroller, to the end that further evidence might be taken upon the question whether any of the relator's rolling stock was used exclusively outside of the State, with directions that if it should be found that such was the fact the amount of the rolling stock so used should be deducted. 173 N. Y. 255. On rehearing of No. 81 and with it No. 82, before the comptroller, now Miller, no evidence was offered to prove that any of the relator's cars or engines were used continuously and exclusively outside of the State during the whole tax year. In the later cases it was admitted that no substantial amount of the equipment was so used during the similar period. But in all of them evidence was offered of the movements of particular cars, to illustrate the transfers which they went through before they returned, as has been stated, evidence of the relator's road mileage outside and inside of the State, and also evidence of the car mileage outside and inside of the State, in order to show, on one footing or the other, that a certain proportion of cars, although not the same cars, was continuously without the State during the whole tax year. The comptroller refused to make any reduction of the tax, and the case being taken up again, his refusal was affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals on the authority of the former decision. 89 App. Div. 127 : 177 N. Y. 584. The later cases took substantially the same course. The relator saved the questions whether the statute as construed was not contrary to Article 1, § 8, of the Constitution of the United States, as to commerce among the States ; Article 1, § 10, against impairing the obligation of contracts : Article 4, § 1, as to giving full faith and credit to the public acts of other States : and the Fourteenth Amendment. It took out writs of error and brought the cases here.

The argument for the relator had woven through it suggestions which only tended to show that the construction of the New York statute by the Court of Appeals was wrong. Of course if the statute as construed is valid under the Constitution, we are bound by the construction given to it by the State court. In this case we are to assume that the statute purports and intends to allow no deduction from the capital stock taken as the basis of the tax, unless some specific portion of the corporate property is outside of the State during the whole tax year. We must assume, further, that no part of the corporate property in question was outside of the State during the whole tax year. The proposition really was conceded, as we have said, and the evidence that was offered had no tendency to prove the contrary. If we are to suppose that the reports offered in evidence were accepted as competent to establish the facts which they set forth, still it would be going a very great way to infer from car mileage the average number or proportion of cars absent from the State. For, as was said by a witness, the reports show only that the cars made so many miles, but it might be ten or it



might be fifty cars that made them. Certainly no inference whatever could be drawn that the same cars were absent from the State all the time.

In view of what we have said it is questionable whether the relator has offered evidence enough to open the constitutional objections urged against the tax. But as it cannot be doubted, in view of the well-known course of railroad business, that some considerable proportion of the relator's cars always is absent from the State, it would be unsatisfactory to turn the case off with a merely technical answer, and we proceed. The most salient points of the relator's argument are as follows: This tax is not a tax on the franchise to be a corporation, but a tax on the use and exercise of the franchise of transportation. The use of this or any other franchise outside the State cannot be taxed by New York. The car mileage within the State and that upon other lines without the State afford a basis of apportionment of the average total of cars continuously employed by other corporations without the State, and the relator's road mileage within and without the State affords a basis of apportionment of its average total equipment continuously employed by it respectively within and without the State. To tax on the total value within and without is beyond the jurisdiction of the State, a taking of property without due process of law, and an unconstitutional interference with commerce among the States.

A part of this argument we have answered already. But we must go further. We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts it must be sustained by us. It is called a franchise tax in the act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, Lackawanna & Western R. R. v. Pennsylvania*, 198 U. S. 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case. See *People v. Morgan*, 178 N. Y. 433, 439. If it is a tax on any franchise which the State of New York gave, and the same State could take away, it stands at least no worse. The relator's argument assumes that it must be regarded as a tax of a particular kind, in order to invalidate it, although it might be valid if regarded as the State court regards it.

Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 201, 211; *Delaware, Lackawanna & Western R. R. v. Pennsylvania*, 198 U. S. 341; *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought

back. Using the language of domicil, which now so frequently is applied to inanimate things, the State of origin remains the permanent *situs* of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & Lord Tie Co. v. Kentucky*, May 21, 1906, 202 U. S. 409. See also *Union Refrigerator Transit Co. v. Kentucky* 199 U. S. 194, 208, 209.

It was suggested that this case is but the complement of *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, and that as there a tax upon a foreign corporation was sustained, levied on such proportion of its capital stock as the miles of track over which its cars were run within the State bore to the whole number of miles over which its cars were run, so here in the domicil of such a corporation there should be an exemption corresponding to the tax held to be lawfully levied elsewhere. But in that case it was found that the "cars used in this State have, during all the time for which tax is charged, been running into, through and out of the State." The same cars were continuously receiving the protection of the State and, therefore, it was just that the State should tax a proportion of them. Whether if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home.

*Judgments affirmed.*

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METROPOLITAN LIFE INSURANCE COMPANY v.  
NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES. 1907.

[*Reported* 205 U. S. 395.]

MOODY, J. This is a writ of error to review the judgment of the Supreme Court of Louisiana, which sustained a tax on the "credits, money loaned, bills receivable," etc., of the plaintiff in error, a life insurance company incorporated under the laws of New York, where it had its home office and principal place of business. It issued policies of life insurance in the State of Louisiana and, for the purpose of doing that and other business, had a resident agent, called a superintendent, whose duty it was to superintend the company's business generally in the State. The agent had a local office in New Orleans. The company was engaged in the business of lending money to the holders

of its policies, which, when they had reached a certain point of maturity, were regarded as furnishing adequate security for loans. The money lending was conducted in the following manner: The policy holders desiring to obtain loans on their policies applied to the company's agent in New Orleans. If the agent thought a loan a desirable one he advised the company of the application by communicating with the home office in New York, and requested that the loan be granted. If the home office approved the loan the company forwarded to the agent a check for the amount, with a note to be signed by the borrower. The agent procured the note to be signed, attached the policy to it, and forwarded both note and policy to the home office in New York. He then delivered to the borrower the amount of the loan. When interest was due upon the notes it was paid to the agent and by him transmitted to the home office. It does not appear whether or not the notes were returned to New Orleans for the endorsement of the payments of interest. When the notes were paid it was to the agent, to whom they were sent to be delivered back to the makers. At all other times the notes and policies securing them were kept at the home office in New York. The disputed tax was not *eo nomine* on these notes, but was expressed to be on "credits, money loaned, bills receivable," etc., and its amount was ascertained by computing the sum of the face value of all the notes held by the company at the time of the assessment. The tax was assessed under a law, Act 170 of 1898, which provided for a levy of annual taxes on the assessed value of all property situated within the State of Louisiana, and in Section 7 provided as follows:

"That it is the duty of the tax assessors throughout the State to place upon the assessment list all property subject to taxation, including merchandise or stock in trade on hand at the date of listing within their respective districts or parishes. . . . *And provided further*, In assessing mercantile firms the true intent and purpose of this act shall be held to mean the placing of such value upon stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, &c., as will represent in their aggregate a fair average on the capital, both cash and credits, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this State business interests that may claim domicile elsewhere, the intent and purpose being that no non-resident, either by himself or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this State are hereby declared as assessable within this State and at the business domicile of said non-resident, his agent or representative."

The evident purpose of this law is to lay the burden of taxation equally upon those who do business within the State. It requires that in the valuation for the purposes of taxation of the property of mercantile firms the stock, goods, and credits shall be taken into account, to

the end that the average capital employed in the business shall be taxed. This method of assessment is applied impartially to the citizens of the State and to the citizens of other States or countries doing business, personally or through agents, within the State of Louisiana. To accomplish this result, the law expressly provides that "all bills receivable, obligations or credits arising from the business done in this State shall be assessable at the business domicile of the resident." Thus it is clear that the measure of the taxation designed by the law is the fair average of the capital employed in the business. Cash and credits and bills receivable are to be taken into account merely because they represent the capital and are not to be omitted because their owner happens to have a domicile in another State. The law was so construed by the Supreme Court of Louisiana, where, in sustaining the assessment, it was said :

"There can be no doubt that the seventh section of the act of 1898, quoted in the judgment of the District Court, announced the policy of the State touching the taxation of credits and bills of exchange representing an amount of the property of non-residents equivalent or corresponding to said bills or credits which was utilized by them in the prosecution of their business in the State of Louisiana. The evident object of the statute was to do away with discrimination theretofore existing in favor of non-residents as against residents, and place them on an equal footing. The statute was not arbitrary, but a legitimate exercise of legislative power and discretion."

The tax was levied in obedience to the law of the State, and the only question here is whether there is anything in the Constitution of the United States which forbids it. The answer to that question depends upon whether the property taxed was within the territorial jurisdiction of the State. Property situated without that jurisdiction is beyond the State's taxing power, and the exaction of a tax upon it is in violation of the Fourteenth Amendment to the Constitution. *Louisville Ferry Co. v. Kentucky*, 188 U. S. 385; *Delaware, &c., Railroad Co. v. Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194. But personal property may be taxed in its permanent abiding place, although the domicile of the owner is elsewhere. It is usually easy to determine the taxable *situs* of tangible personal property. But where personal property is intangible, and consists, as in this case, of credits reduced to the concrete form of promissory notes, the inquiry is complicated, not only by the fiction that the domicile of personal property follows that of its owner, but also by the doctrine, based upon historical reasons, that where debts have assumed the form of bonds or other specialties, they are regarded for some purposes as being the property itself, and not the mere representative of it, and may have a taxable *situs* of their own. How far promissory notes are assimilated to specialties in respect of this doctrine, need not now be considered.

The question in this case is controlled by the authority of the previous decisions of this court. Taxes under this law of Louisiana have

been twice considered here, and assessments upon credits arising out of investments in the State have been sustained. A tax on credits evidenced by notes secured by mortgages was sustained where the owner, a non-resident who had inherited them, left them in Louisiana in the possession of an agent, who collected the principal and interest as they became due. *New Orleans v. Stempel*, 175 U. S. 309. Again, it was held that where a foreign banking company did business in New Orleans, and through an agent lent money which was evidenced by checks drawn upon the agent, treated as overdrafts and secured by collateral, the checks and collateral remaining in the hands of the agent until the transactions were closed, the credits thus evidenced were taxable in Louisiana. *Board of Assessors v. Comptoir National*, 191 U. S. 388. In both of these cases the written evidences of the credits were continuously present in the State, and their presence was clearly the dominant factor in the decisions. Here the notes, though present in the State at all times when they were needed, were not continuously present, and during the greater part of their lifetime were absent and at their owner's domicile. Between these two decisions came the case of *Bristol v. Washington County*, 177 U. S. 133. It appeared in that case that a resident of New York was engaged through an agent in the business of lending money in Minnesota, secured by mortgages on real property. The notes were made to the order of the non-resident, though payable in Minnesota, and the mortgages ran to her. The agent made the loans, took and kept the notes and securities, collected the interest and received payment. The property thus invested continued to be taxed without protest in Minnesota, until finally the course of business was changed by sending the notes to the domicile of the owner in New York, where they were kept by her. The mortgages were, however, retained by the agent in Minnesota, though his power to discharge them was revoked. The interest was paid to the agent and the notes forwarded to him for collection when due. Taxes levied after this change in the business were in dispute in the case. In delivering the opinion of the court, Mr. Chief Justice Fuller said: "Nevertheless, the business of loaning money through the agency in Minnesota was continued during all these years, just as it had been carried on before, and we agree with the Circuit Court that the fact that the notes were sent to Mrs. Bristol in New York, and the fact of the revocation of the power of attorney, did not exempt these investments from taxation under the statutes as expounded in the decisions to which we have referred. . . ."

Referring to the case of *New Orleans v. Stempel*, the Chief Justice said:

"There the moneys, notes, and other evidences of credits were in fact in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule.

"Persons are not permitted to avail themselves, for their own benefit,

of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public need, through action of this sort, whether taken for convenience or by design."

Accordingly it was held that the tax was not forbidden by the Federal Constitution.

In this case, the controlling consideration was the presence in the State of the capital employed in the business of lending money, and the fact that the notes were not continuously present was regarded as immaterial. It is impossible to distinguish the case now before us from the Bristol case. Here the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the State. The notes and securities were in Louisiana whenever the business exigencies required them to be there. Their removal with the intent that they shall return whenever needed, their long continued though not permanent absence, cannot have the effect of releasing them as the representatives of investments in business in the State from its taxing power. The law may well regard the place of their origin, to which they intend to return, as their true home, and leave out of account temporary absences, however long continued. Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the *situs* of the latter, can be allowed to obscure the truth. *Blackstone v. Miller*, 188 U. S. 189. We are not dealing here merely with a single credit or a series of separate credits, but with a business. The insurance company chose to enter into the business of lending money within the State of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the State. The State undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the State had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the State evidences of credits in the form of notes. Under such circumstances, they have a taxable *situs* in the State of their origin.

The judgment of the Supreme Court of Louisiana is

*Affirmed.*

## IN RE ESTATE OF SWIFT.

COURT OF APPEALS OF NEW YORK. 1893.

*[Reported 137 New York, 77.]*

GRAY, J. James T. Swift died in July, 1890, being a resident of this State and leaving a will, by which he made a disposition of all his property among relatives. After many legacies of money and of various articles of personal property, he directed a division of his residuary estate into four portions, and he devised and bequeathed one portion to each of four persons named. The executors were given a power of sale for the purpose of paying the legacies and of making the distribution of the estate. At the time of his death, the testator's estate included certain real estate and tangible personal property in chattels, situated within the State of New Jersey, which were realized upon by the executors and converted into moneys in hand. When, upon their application, an appraisal was had of the estate, in order to fix its value under the requirements of the law taxing gifts, legacies, and inheritances, the surrogate of the county of New York, before whom the matter came, held, with respect to the appraisal, that the real and personal property situated without the State of New York were not subject to appraisal and tax under the law, and the exceptions taken by the comptroller of the city of New York to that determination raise the first and the principal question which we shall consider.

Surrogate Ransom's opinion, which is before us in the record, contains a careful review of the legal principles which limit the right to impose the tax, and his conclusions are as satisfactory to my mind, as they evidently were to the minds of the learned justices of the General Term of the Supreme Court, who agreed in affirming the surrogate's decree upon his opinion.

The Attorney-General has argued that this law, commonly called the collateral inheritance tax law, imposes not a property tax but a charge for the privilege of acquiring property, and, as I apprehend it, the point of his argument is that, as there is no absolute right to succeed to property, the State has a right to annex a condition to the permission to take by will, or by the intestate laws, in the form of a tax, to be paid by the persons for whose benefit the remedial legislation has been enacted. That is, substantially, the way in which he puts the proposition, and if the premise be true that the tax imposed is upon the privilege to acquire, and, as he says in his brief, is like "a duty imposed, payable by the beneficiary," possibly enough, we should have to agree with him. We might think, in that view of the act, that the situs of property in a foreign jurisdiction was not a controlling circumstance. But if we take up the provisions of the law by which the tax is imposed, and if we consider them as they are framed and the prin-

ciple which then seems to underlie the peculiar system of taxation created, I do not think that his essential proposition finds adequate support. The law in force at the time of the decease of the testator is contained in chapter 713 of the Laws of 1887, amending chapter 483 of the Laws of 1885, and is entitled "An act to tax gifts, legacies, and collateral inheritances in certain cases."

By the first section it is provided that "all property which shall pass by will . . . from any person who may die seized or possessed of the same, while a resident of this State, or, if such decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State, . . . shall be and is subject to a tax . . . to be paid . . . for the use of the State," etc.

In the fourth section it is provided that "all taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent," etc.

By the sixth section, it is provided that the executor shall "deduct the tax from the legacy or property, subject to said tax, or if the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee, or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon," etc. The language of the act has been justly condemned, for being involved and difficult to read clearly; but considering the language employed in these and in other sections of the law, in its ordinary sense, I think we would at once say that if the legislature had not actually imposed a tax upon the property itself, upon the death of its owner, it had certainly intended to impose a tax upon its succession, which was to be a charge upon the property, and which operated, in effect, to diminish *pro tanto* its value, or the capital, coming to the new owner under a will, or by the intestate laws. Could any one say, after reading the provisions of this law, that it was the legatee, or person entitled, who was taxed? I doubt it. Property, which was the decedent's at the time of his death, is subjected to the payment of a tax. The tax is to be deducted from the legacy; or, when deduction is not possible from the legacy not being in money, and a collection from the legatee or the person entitled to the property is authorized to be made, the tax so to be collected is described as "the tax thereon," that is, on the property.

If it should be said that such an interpretation of the law is in conflict with a doctrine which some judges have asserted, respecting the nature of this tax, I think it might be sufficient to say that the phraseology of the New York law differs, more or less, from that of other States, and seems peculiarly to charge the subject of the succession with the payment of the tax. But I do not think it at all important to our decision here that we should hold it to be a tax upon property precisely.

A precise definition of the nature of this tax is not essential, if it is



susceptible of exact definition. Thus far, in this court, we have not thought it necessary, in the cases coming before us, to determine whether the object of taxation is the property which passes, or not; though, in some, expressions may be found which seem to regard the tax in that light. *Matter of McPherson*, 104 N. Y. 306; *Matter of Enston*, 113 id. 174; *Matter of Sherwell*, 125 id. 379; *Matter of Romaine*, 127 id. 80; and *Matter of Stewart*, 131 id. 274. The idea of this succession tax, as we may conveniently term it, is more or less compound; the principal idea being the subjection of property, ownership of which has ceased by reason of the death of its owner, to a diminution, by the State reserving to itself a portion of its amount, if in money, or of its appraised value, if in other forms of property. The accompanying, or the correlative idea should necessarily be that the property, over which such dominion is thus exercised, shall be within the territorial limits of the State at its owner's death, and, therefore, subject to the operation and the regulation of its laws. The State, in exercising its power to subject realty, or tangible property, to the operation of a tax, must, by every rule, be limited to property within its territorial confines.

The question here does not relate to the power of the State to tax its residents with respect to the ownership of property situated elsewhere. That question is not involved. The question is whether the legislature of the State, in creating this system of taxation of inheritances, or testamentary gifts, has not fixed as the standard of right the property passing by will, or by the intestate laws.

What has the State done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease, allowing only the balance to pass in the way directed by testator, or permitted by its intestate law, and while, in so doing, it is exercising an inherent and sovereign right, it seems very clear to my mind that it affects only property which lies within it, and, consequently, is subject to its right of eminent domain. The theory of sovereignty, which invests the State with the right and the power to permit and to regulate the succession to property upon its owner's decease, rests upon the fact of an actual dominion over that property. In exercising such a power of taxation, as is here in question, the principle, obviously, is that all property in the State is tributary for such a purpose and the sovereign power takes a portion, or percentage of the property, not because the legatee is subject to its laws and to the tax, but because the State has a superior right, or ownership, by force of which it can intercept the property, upon its owner's death, in its passage into an ownership regulated by the enabling legislation of the State.

The rules of taxation have become pretty well settled, and it is fundamental among them that there shall be jurisdiction over the subject taxed; or, as it has been sometimes expressed, the taxing power of the State is coextensive with its sovereignty. It has not the power to

tax directly either lands or tangible personal property situated in another State or country. As to the latter description of property no fiction transmuting its situs to the domicile of the owner is available, when the question is one of taxation. In this connection the observations of Chief Judge Comstock, in *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224, and of some text-writers, are not inappropriately referred to. He had said that lands and personal property having an actual situation within the State are taxable, and, by a necessary implication, that no other property can be taxed. He says, further, "If we say that taxation is on the person in respect to the property, we are still without a reason for assessing the owner-resident here in respect to one part of his estate situated elsewhere and not in respect to another part. Both are the subjects of taxation in the foreign jurisdiction."

In Judge Cooley's work on Taxation it is remarked (p. 159) that "a State can no more subject to its power a single person, or a single article of property, whose residence or situs is in another State, than it can subject all the citizens, or all the property of such other State to its power."

Judge Cooley had reference in his remarks to the case of bonds of a railroad; for he cites the case of "the State Tax on Foreign-Held Bonds" in the United States Supreme Court (15 Wallace, 300), where Mr. Justice Field delivered the opinion, and, in the course of it, observed that "the power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

Judge Story, in his work on the Conflict of Laws, speaking of the subject of jurisdiction in regard to property, said (section 550) that the legal fiction as to the situs of movables yields when it is necessary for the purpose of justice, and, further, "a nation within whose territory any personal property is actually situated has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there."

The proposition which suggests itself from reasoning, as from authority, is that the basis of the power to tax is the fact of an actual dominion over the subject of taxation at the time the tax is to be imposed.

The effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons. If it is called a tax upon the succession to the ownership of property, still it relates to and subjects the property itself, and when that is without the jurisdiction of the State, inasmuch as the succession is not of property within the dominion of the State, succession to it cannot be said to occur by permission of the State. As to lands this is clearly the case, and rights in or power over them are derived from or through the laws of the foreign State or country. As to goods and chattels it is true; for their transmission abroad is subject to the permission of and regulated

by the laws of the State or country where actually situated. Jurisdiction over them belongs to the courts of that State or country for all purposes of policy, or of administration in the interests of its citizens, or of those having enforceable rights, and their surrender, or transmission, is upon principles of comity.

When succession to the ownership of property is by the permission of the State, then the permission can relate only to property over which the State has dominion and as to which it grants the privilege or permission.

Nor is the argument available that, by the power of sale conferred upon the executors, there was an equitable conversion worked of the lands in New Jersey, as of the time of the testator's death, and, hence, that the property sought to be reached by the tax, in the eye of the law, existed as cash in this State in the executor's hands, at the moment of the testator's death. There might be some doubt whether the main proposition in the argument is quite correct, and whether the land did not vest in the residuary legatees, subject to the execution of the power of sale. But it is not necessary to decide that question. Neither the doctrine of equitable conversion of lands, nor any fiction of situs of movables, can have any bearing upon the question under advisement. The question of the jurisdiction of the State to tax is one of fact and cannot turn upon theories or fictions; which, as it has been observed, have no place in a well adjusted system of taxation.

We can arrive at no other conclusion, in my opinion, than that the tax provided for in this law is only enforceable as to property which, at the time of its owner's death, was within the territorial limits of this State. As a law imposing a special tax, it is to be strictly construed against the State and a case must be clearly made out for its application. We should incline against a construction which might lead to double taxation; a result possible and probable under a different view of this law. If the property in the foreign jurisdiction was in land, or in goods and chattels, when, upon the testator's death, a new title, or ownership, attached to it, the bringing into this State of its cash proceeds, subsequently, no matter by what authority of will, or of statute, did not subject it to the tax. A different view would be against every sound consideration of what constitutes the basis for such taxation, and would not accord with an understanding of the intention of the legislature, as more or less plainly expressed in these acts.

Another question, which I shall merely advert to in conclusion, arises upon a ruling of the surrogate with respect to appraisement, in connection with a clause of the will directing that the amount of the tax upon the legacies and devises should be paid as an expense of administration. The appraiser, in ascertaining the value of the residuary estate for the purpose of taxation, deducted the amount of the tax to be assessed on prior legacies. The surrogate overruled him in this, and held that there should be no deduction from the value of the resid-

uary estate of the amount of the tax to be assessed, either upon prior legacies, or upon its value. He held that the legacies taxable should be reported, irrespective of the provision of the will; and that a mode of payment of the succession tax prescribed by will is something with which the statute is not concerned. I am satisfied with his reasoning and can add nothing to its force. Manifestly, under the law that which is to be reported by the appraiser for the purpose of the tax is the value of the interest passing to the legatee under the will, without any deduction for any purpose, or under any testamentary direction.

A question is raised as to the effect upon the law, as contained in the acts of 1885 and 1887, of the passage of chapter 215 of the Laws of 1891; but as that has been the subject of another appeal, and is fully discussed in the opinion in the Matter of the Estate of Prime, 136 N. Y. 347, reference will be made to it here.

My brethren are of the opinion that the tax imposed under the act is a tax on the right of succession, under a will, or by devolution in case of intestacy; a view of the law which my consideration of the question precludes my assenting to.

They concur in my opinion so far as it relates to the imposition of a tax upon real estate situated out of this State, although owned by a decedent, residing here at the time of his decease; holding with me that taxation of such was not intended, and that the doctrine of equitable conversion is not applicable to subject it to taxation. But as to the personal property of a resident decedent, wheresoever situated, whether within or without the State, they are of the opinion that it is subject to the tax imposed by the act.

The judgment below, therefore, should be so modified as to exclude from its operation the personal property in New Jersey, and, as so modified, it should be affirmed, without costs to either party as against the other.<sup>1</sup>

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### FROTHINGHAM v. SHAW.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1899.

[Reported 175 Massachusetts, 59.]

MORTON, J. This is a petition by the plaintiff, as executor of the will of one Joseph Frothingham, for instructions in regard to the payment of a collateral inheritance tax on the residuary legacies. The case was heard on agreed facts, and comes here by successive appeals from decrees of the probate court and of a single justice of this court finding that the tax was payable, and directing the executor to pay the same. At the time of his death the testator was domiciled at Salem, in this Commonwealth, and his estate, except certain real estate situ-

<sup>1</sup> See *In re Bronson*, 150 N. Y. 1. — ED.

ated here, and appraised at \$2100, and cash in a savings bank in Salem amounting to \$993, was, and for many years had been, in the hands of his agents in New York, and consisted of bonds and stock of foreign corporations, a certificate of indebtedness of a foreign corporation, bond secured by mortgage on real estate in New Hampshire, the makers living in New York, and of cash on deposit with a savings bank and with individuals in Brooklyn; the total being upwards of \$40,000. There has been no administration in New York, and the petitioner has taken possession of all the property except the real estate, and has paid all of the debts and legacies except the residuary legacies. None of the legacies are entitled to exemption if otherwise liable to the tax. The appellants contend that the stocks, bonds, etc., were not "property within the jurisdiction of the Commonwealth," within the meaning of St. 1891, c. 425, § 1, and that, if they were, the succession took place by virtue of the law of New York, and not of this State. It is clear that, if the question of the liability of the testator to be taxed in Salem for the property had arisen during his lifetime, he would have been taxable for it under Pub. St. c. 11, §§ 4, 20, notwithstanding the certificates, etc., were in New York (*Kirkland v. Hotchkiss*, 100 U. S. 491; *State Tax on Foreign-Held Bonds Case*, 15 Wall. 300; *Cooley, Tax'n* [2d ed.], 371); and the liability would have extended to and included the bonds secured by mortgage (*Kirkland v. Hotchkiss, supra*; *State Tax on Foreign-Held Bonds Case, supra*; *Hale v. Commissioners*, 137 Mass. 111). It is true that the Public Statutes provide that personal property, wherever situated, whether within or without the Commonwealth, shall be taxed to the owner in the place where he is an inhabitant. But it is obvious that the legislature cannot authorize the taxation of property over which it has no control, and the principle underlying the provision is that personal property follows the person of the owner, and properly may be regarded, therefore, for the purposes of taxation, as having a situs at his domicile, and as being taxable there. After the testator's death the property would have been taxable to his executors for three years, or till distributed and paid over to those entitled to it, and notice thereof to the assessors; showing that the fiction, if it is one, is continued for the purposes of taxation after the owner's death. Pub. St. c. 11, § 20, cl. 7; *Hardy v. Inhabitants of Yarmouth*, 6 Allen, 277. In the present case the tax is not upon property as such, but upon the privilege of disposing of it by will, and of succeeding to it on the death of the testator or intestate; and it "has," as was said in *Minot v. Winthrop, infra*, "some of the characteristics of a duty on the administration of the estates of deceased persons." *Minot v. Winthrop*, 162 Mass. 113; *Callahan v. Woodbridge*, 171 Mass. 595; *Greves v. Shaw*, 173 Mass. 205; *Moody v. Shaw*, 173 Mass. 375. In arriving at the amount of the tax, the property within the jurisdiction of the Commonwealth is considered, and we see no reason for supposing that the legislature intended to depart from the principle heretofore

adopted, which regards personal property, for the purposes of taxation, as having a situs at the domicile of its owner. This is the general rule (Cooley, Tax'n [2d ed.], 372), and, though it may and does lead to double taxation, that has not been accounted a sufficient objection to taxing personal property to the owner during his life at the place of his domicile, and we do not see that it is a sufficient objection to the imposition of succession taxes or administration duties, under like circumstances, after his death. In regard to the mortgage bonds, it is to be noted, in addition to what has been said, that this case differs from *Callahan v. Woodbridge*, *supra*. In that case the testator's domicile was in New York, and it does not appear from the opinion that the note and mortgage deed were in this State. In this case the domicile was in this Commonwealth, and we think that, for the purposes of taxation, the mortgage debt may be regarded as having a situs here. This is the view taken in *Hanson, Death Duties* (4th ed.), 239, 240, which is cited apparently with approval by Mr. Dicey, though he calls attention to cases which may tend in another direction. See Dicey, *Confl. Laws*, 319, note 1. It seems to us, therefore, that for the purposes of the tax in question the property in the hands of the executor must be regarded as having been within the jurisdiction of this Commonwealth at the time of the testator's death. See *In re Swift*, 137 N. Y. 77; *In re Miller's Estate*, 182 Pa. St. 162.

The petitioner further contends that the succession took place by virtue of the law of New York. But it is settled that the succession to movable property is governed by the law of the owner's domicile at the time of his death. This, it has been often said, is the universal rule, and applies to movables wherever situated. *Stevens v. Gaylord*, 11 Mass. 256; *Dawes v. Head*, 3 Pick. 129, 144, 145; *Fay v. Haven*, 3 Mete. (Mass.) 109; *Wilkins v. Ellett*, 9 Wall. 740; *id.* 108 U. S. 256; *Freke v. Carbery*, L. R. 16 Eq. 461; *Attorney-General v. Campbell*, L. R. 5 H. L. 524; *Duncan v. Lawson*, 41 Ch. Div. 394; *Sill v. Worswick*, 1 H. Bl. 690; Dicey, *Confl. Laws*, 683; *Story, Confl. Laws* (7th ed.), §§ 380, 481. If there are movables in a foreign country, the law of the domicile is given an extra-territorial effect by the courts of that country, and in a just and proper sense the succession is said to take place by force of, and to be governed by, the law of the domicile. Accordingly it has been held that legacy and succession duties, as such, were payable at the place of domicile in respect to movable property wherever situated, because in such cases the succession or legacy took effect by virtue of the law of domicile. *Wallace v. Attorney-General* (1865) 1 Ch. App. 1; Dicey, *Confl. Laws*, 785; *Hanson, Death Duties* (4th ed.), 423, 526. With probate or estate or administration duties, as such, it is different. They are levied in respect of the control which every government has over the property actually situated within its jurisdiction, irrespective of the place of domicile. *Laidley v. Lord Advocate*, 15 App. Cas. 468, 483; *Hanson, Death Duties* (4th ed.), 2, 63. Of course, any state or country may impose

a tax, and give it such name or no name as it chooses, which shall embrace, if so intended, the various grounds upon which taxes are or may be levied in respect of the devolution of estates of deceased persons, and which shall be leviable according as the facts in each particular case warrant. In England, for instance, the "estate duty," as it is termed, under the Finance Act of 1894 (57 & 58 Vict. c. 30), has largely superseded the probate duty, and under some circumstances takes the place of the legacy and succession duty also. Hanson, *Death Duties* (4th ed.), 62, 63, 81. But, whatever the form of the tax, the succession takes place and is governed by the law of the domicile, and if the actual situs is in a foreign country, the courts of that country cannot annul the succession established by the law of the domicile. *Dammert v. Osborn*, 141 N. Y. 564. In further illustration of the extent to which the law of the domicile operates, it is to be noted that the domicile is regarded as the place of principal administration, and any other administration is ancillary to that granted there. Payment by a foreign debtor to the domiciliary administrator will be a bar to a suit brought by an ancillary administrator subsequently appointed. *Wilkins v. Ellett*, *supra*; *Stevens v. Gaylord*, *supra*; *Hutchins v. Bank*, 12 Metc. (Mass.) 421; *Martin v. Gage*, 147 Mass. 204. And the domiciliary administrator has sufficient standing in the courts of another State to appeal from a decree appointing an ancillary administrator. *Smith v. Sherman*, 4 Cnsh. 408. Moreover, it is to be observed — if that is material — that there has been no administration in New York, that the executor was appointed here, and has taken possession of the property by virtue of such appointment, and must distribute it and account for it according to the decrees of the courts of this Commonwealth. To say, therefore, that the succession has taken place by virtue of the law of New York, would be no less a fiction than the petitioner insists that the maxim, *Mobilia sequuntur personam*, is when applied to matters of taxation. The petitioner contends that in *Callahan v. Woodbridge*, *supra*, it was held that the succession to the personal property in this State took place by virtue of the law of this State, although the testator was domiciled in New York. We do not so understand that case. That case and *Greves v. Shaw*, *supra*, and *Moody v. Shaw*, *supra*, rest on the right of a State to impose a tax or duty in respect to the passing on the death of a non-resident of personal property belonging to him, and situated within its jurisdiction. We think that the decree should be affirmed.<sup>1</sup> *So ordered.*

<sup>1</sup> For the English doctrines as to the effect of their Revenue Laws on non-residents and on foreign property, see *Dicey, Conflict of Laws*, 781.

For cases on the Income Tax, see *Calcutta Jute Mills v. Nicholson*, 1 Ex. D. 428; *Colquhoun v. Brooks*, 14 App. Cas. 493. On Probate Duty, see *Att.-Gen. v. Hope*, 1 C. M. & R. 530; *Sudley v. Att.-Gen.*, [1897] A. C. 11. On Legacy Duty, see *Thompson v. Adv.-Gen.*, 12 Cl. & F. 1; *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192. On Succession Duties, see *Att.-Gen. v. Campbell*, L. R. 5 H. L. 524; *Wallace v. Att.-Gen.*, L. R. 1 Ch. 1. — *Ed.*

## MATTER OF COOLEY.

COURT OF APPEALS, NEW YORK. 1906.

*[Reported 186 N. Y. 220.]*

HISCOCK, J. The appellants complain because in fixing the transfer tax upon certain shares of the capital stock of the Boston and Albany Railroad Company which belonged to the estate and passed under the will of the deceased who was a non-resident, said stock has been appraised at its full market value as representing an interest in the property of said corporation situate both in the State of New York and elsewhere. It is insisted by them that under the peculiar facts of this case the valuation placed for such purpose upon the stock should not have been predicated upon the idea that the latter represented an interest in all of the property of said corporation, but should have been fixed upon the theory that it represented an interest in only a portion of said property.

I think that their complaint is well founded and that the order appealed from should be reversed and the assessment corrected accordingly.

The Boston and Albany Railroad Company is a consolidation formed by the merger of one or more New York corporations and one Massachusetts corporation. The merger was authorized and the said consolidated corporation duly and separately created and organized under the laws of each state. It was, so to speak, incorporated in duplicate. There is but a single issue of capital stock representing all the property of the consolidated and dual organization. Of the track mileage about five-sixths is in Massachusetts and one-sixth in New York. The principal offices, including the stock transfer office, are situated in Boston, and there also are regularly held the meetings of its stockholders and directors. The deceased was a resident of the State of Connecticut, and owned four hundred and twenty-six shares of the capital stock, the value of which for the purposes of the transfer tax was fixed at the full market value of \$252.50 per share of the par value of \$100.

The provisions of the statute (L. 1896, ch. 908, § 220, as amd. L. 1897, ch. 284, § 2), authorizing the imposition of this tax are familiar, and read in part as follows:

“A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein . . . in the following cases: . . .

“2. When the transfer is by will or intestate law, of property within the State, and the decedent was a non-resident of the State at the time of his death.”

The present assessment is under the last clause, and as already inti-



mated, the sole question, stated in practical form, is whether the authorities of this State ought to levy a tax upon the full value of decedent's holdings, recognizing simply the New York corporation and regarding it as the sole owner of all of the property of the doubly incorporated New York-Massachusetts corporation, or whether they should limit the tax to a portion of the total value, upon the theory that the company holds its property in Massachusetts at least under its incorporation in that State.

By seeking the aid of our laws and becoming incorporated under them, the consolidated Boston and Albany Railroad Company became a domestic corporation. (Matter of Sage, 70 N. Y. 220.)

The decedent, therefore, as the owner of Boston and Albany stock, may be regarded as holding stock in a domestic corporation, and it is so clearly settled that we need only state the proposition that capital stock in a domestic corporation, although held by a non-resident, will be regarded as having its *situs* where the corporation is organized, and is, therefore, taxable in this State. (Matter of Bronson, 150 N. Y. 1.)

There is, therefore, no question but that the decedent, holding stock in the Boston and Albany road, which was incorporated under the laws of this State, left "property within the State" which is taxable here. There is no doubt about the meaning of "property within the State," as applied to this situation, or that it justifies a taxation by our authorities of decedent's interest as a shareholder in the corporation created under the laws of this State. The only doubt is as to the extent and value of that interest for the purposes of this proceeding. For, although the tax is upon the transfer and not upon the property itself, still its amount is necessarily measured by the value of the property transferred, and, therefore, we come to consider briefly the nature of the stock here assessed as property and the theory upon which its value should be computed.

The general nature of a shareholder's interest in the capital stock of a corporation is easily understood and defined. In *Plympton v. Bigelow* (93 N. Y. 592) it is said that "The right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts."

In *Jermain v. L. S. & M. S. Ry. Co.* (91 N. Y. 483, 491) it was said: "A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation."

Therefore, since the shares of capital stock under discussion represented a certain interest in the surplus of assets over liabilities of the Boston and Albany Railroad Company, the value of that stock is to be decided by reference to the amount of property which said railroad company as incorporated in this State is to be regarded as owning for the purposes of this proceeding.

In the majority of cases at least a corporation has but a single corporate creation and existence under the laws of one State, and by virtue of such single existence owns all of its corporate property. There is no difficulty in determining in such a case that a shareholder under such an incorporation has an interest in all of the corporate property wherever and in how many different States situated. I shall have occasion to refer to that principle hereafter in another connection. Even in the case of a corporation incorporated and having a separate existence under the laws of more than one State, the stockholder would for some purposes be regarded as having an interest in all the corporate property independent of the different incorporations. In the present case the decedent, by virtue of his stock as between him and the corporation, would be regarded as having an interest in all of its property and entitled to the earnings thereon when distributed as dividends and to his share of the surplus upon dissolution and liquidation proceedings independent of the fact that there were two separate incorporations.

But, as it seems to me, different considerations and principles apply to this proceeding now before us for review. Our jurisdiction to assess decedent's stock is based solely and exclusively upon the theory that it is held in the Boston and Albany Railroad Company as a New York corporation. The authorities are asserting jurisdiction of and assessing his stock only because it is held in the New York corporation of the Boston and Albany Railroad Company. But we know that said company is also incorporated as a Massachusetts corporation, and presumably by virtue of such latter incorporation it has the same powers of owning and managing corporate property which it possesses as a New York corporation. In fact the location of physical property and the exercise of various corporate functions give greater importance to the Massachusetts than to the New York corporation, and the problem is whether for the purpose of levying a tax upon decedent's stock upon the theory that it is held in and under the New York corporation we ought to say that such latter corporation owns and holds all of the property of the consolidated corporation wherever situated, thus entirely ignoring the existence of and the ownership of property by the Massachusetts corporation. It needs no particular illumination to demonstrate that if we take such a view it will clearly pave the way to a corresponding view by the authorities and courts of Massachusetts that the corporation in that State owns all of the corporate property wherever situated, and we shall then further and directly be led to the unreasonable and illogical result that one set of property is at the same time solely and exclusively owned by two different corporations, and that a person holding stock should be assessed upon the full value of his stock in each jurisdiction. Whether we regard such a tax as is here being imposed, a recompense to the State for protection afforded during the life of the decedent or as a condition imposed for creating

and allowing certain rights of transfer or of succession to property upon death, we shall have each State exacting full compensation upon one succession and a clear case of double taxation. And if the corporation had been compelled for sufficient reasons to take out incorporation in six or twenty other States each one of them might take the same view and insist upon the same exaction until the value of the property was in whole or large proportion exhausted in paying for the privilege of succession to it. While undoubtedly the legislative authority is potent enough to prescribe and enforce double taxation, it is plain that, measured by ordinary principles of justice, the result suggested would be inequitable and might be seriously burdensome.

Double taxation is one which the courts should avoid whenever it is possible within reason to do so. (Matter of James, 144 N. Y. 6, 11.)

It is never to be presumed. Sometimes tax laws have that effect, but if they do it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition. (Tennessee v. Whitworth, 117 U. S. 129.)

The law of taxation is to be construed strictly against the State in favor of the taxpayer, as represented by the executor of the estate. (Matter of Fayerweather, 143 N. Y. 114.)

It seems pretty clear that within the principles of the foregoing and many other cases which might be cited, we ought not to sanction a course which will lead to a tax, measured by the full value of the decedent's stock in each State upon the conflicting theories that the corporation in that State owns all of the property of the consolidated company, unless there is something in the statute, or decisions under the statute, which compels us so to do. I do not think there is in either place such compelling authority.

No doubt is involved, as it seems to me, about the meaning and application of the statute. The decedent's stock was "property within the State," which had its *situs* here as being held in the New York corporation, and the transfer of it was taxable here. There can be no dispute about that. The question is simply over the extent and value of his interest as such stockholder, in view of the other incorporation in Massachusetts. I see nothing in the statute which prevents us from paying decent regard to the principles of interstate comity, and from adopting a policy which will enable each State fairly to enforce its own laws without oppression to the subject. This result will be attained by regarding the New York corporation as owning the property situate in New York and the Massachusetts corporation as owning that situate in Massachusetts, and each as owning a share of any property situate outside of either State or moving to and fro between the two States, and assessing decedent's stock upon that theory. That is the obvious basis for a valuation if we are to leave any room for the Massachusetts corporation and for a taxation by that State similar in principle to our own without double taxation.

Some illustrations may be referred to which by analogy sustain the general principles involved.

Where a tax is levied in this State upon the capital or franchises of a corporation organized as this railroad was, the tax is levied upon an equitable basis. Thus by the provisions of section 6 of chapter 19 of the Laws of 1869, under which the Boston and Albany railroad was organized, the assessment and taxation of its capital stock in this State is to be in the proportion "that the number of miles of its railroad situated in this State bears to the number of miles of its railroad situated in the other State," and under section 182 of the General Tax Law of the State of New York the franchise tax of a corporation is based upon the amount of capital within the State.

Again, assume that for purposes of dissolution or otherwise, receivers were to be appointed of the Boston and Albany railroad, there can be no doubt that the receivers of it as a New York corporation would be appointed by the courts of that State, and the receivers of it as a Massachusetts corporation would be appointed by the courts of that State, and that the courts would hold that in the discharge of their duties the New York receivers should take possession of and administer upon the property of the New York corporation within the limits of that State, and would not permit the Massachusetts receivers to come within its confines and interfere with such ownership, and the Massachusetts courts would follow a similar policy. Why should not the State authorities for purposes of this species of taxation and valuation, involved therein, adopt a similar theory of division of property?

We are not apprehensive lest, as suggested, New York corporations may take out incorporation in other States for the purpose of exempting transfers of their capital stock from taxation under the principles of this decision. We do not regard our decision as giving encouragement to any such course. It is based upon and limited by the facts as they are here presented, and there is no question whatever but that the Boston and Albany railroad, in good faith and for legitimate reasons, was equally and contemporaneously created both as a New York and a Massachusetts corporation. It can no more be said that being originally and properly a New York corporation it subsequently and incidentally became a Massachusetts one than could be maintained the reverse of such proposition. If in the future a corporation created and organized under the laws of this State, or properly and really to be regarded as a New York corporation, shall see fit either for the purpose suggested, or for any other reason subsequently and incidentally and for ancillary reasons, to take out incorporation in another State, a case would arise not falling within this decision.

But it is said that this court has already made decisions which prevent it from adopting such a construction as I have outlined, and reference is made to *Matter of Bronson* (150 N. Y. 1) and *Matter of Palmer* (183 N. Y. 238).

I do not find anything in those decisions which, interpreted as a whole, with reference to the facts there being discussed, conflicts with the views which I have advanced.

In the first case the question arose whether a tax might be imposed upon a transfer of a non-resident decedent's residuary estate which "consisted in shares of the capital stock and in the bonds of corporations incorporated under the laws of this State." So far as the discussion relates to the question of taxing the bonds, it is immaterial. It was held that the shares of capital stock were property which was taxable, it being said: "The shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. The corporation has the legal title to all the properties acquired and appurtenant, but it holds them for the pecuniary benefit of those persons who hold the capital stock. . . . Each share represents a distinct interest in the whole of the corporate property." In other words, Judge GRAY, in writing the majority opinion, was discussing the situation of a shareholder in a domestic corporation which, so far as appears, was not incorporated under the laws of another State. Under such circumstances, of course, the New York corporation would be the owner of all the property there was, and the shareholder's interest in such corporation would represent his interest in all of said property and be fairly and justly taxable upon its full amount and value. No such situation was presented as here arises. There was no second or third corporation under the laws of another State, which corporation might just as fairly be said to be the owner of all the property as the New York corporation, thus raising the question here presented whether each corporation should be regarded as owning and holding all of the property there was for the purpose of laying the basis for taxation, or whether we should adopt an equitable and reasonable view, giving credit to each corporation for the purpose of taxation of owning some certain portion of the entire property.

In the Palmer case again the question arose over taxing shares of stock held by a non-resident decedent in a domestic corporation which was not proved or considered to have been incorporated under the laws of another State. It was insisted that the amount of the tax should be reduced by the proportion of property owned by the corporation and located in other States, and this contention was overruled, and, as it seems to me, for a perfectly good reason upon the facts in that case and which is not applicable to the facts here. As stated, there was a single incorporation under the laws of this State, and that domestic corporation owned all of the property in whatever State situated. Its corporate origin was under the laws of this State, and there its corporate existence was centred. It just as fully and completely owned and managed property situated in the State of Ohio as if it was situated in the State of New York, and if the property in the foreign

State was reduced to money, such money would be turned into its treasury in the State of New York. Under such circumstances there was nothing else that could reasonably be held than that the corporation owned all property wherever situated, and that the shareholder's interest in such corporation represented and was based upon such ownership of all the property. There was no double incorporation and no chance for conflict between an incorporation under the laws of this State and a second one existing under the laws of another State, which must either be reconciled by a just regard for the rights of both States and the rights of the incorporation under each, or else double taxation imposed upon a shareholder.

It is also argued that the courts of Massachusetts have passed upon the very contention here being made by appellants, and in the case of *Moody v. Shaw* (173 Mass. 375) have rejected the claim that the valuation of stock in this same corporation for the purposes of transfer taxation in Massachusetts should be based upon any apportionment of property between the Massachusetts and New York corporations. The opinion in that case does not seem to warrant any such construction. Apparently the only question under discussion was whether the transfer of stock in such corporation was taxable at all in Massachusetts, and the question of any apportionment was not passed upon. Such expressions as are found in the opinion touching that point certainly do not indicate to my mind that if involved and passed upon it would have been decided adversely to the views here expressed.

Lastly, it is urged that there will be great practical difficulty in making an apportionment of property for the purposes of valuation and taxation upon the lines suggested, and the learned counsel for the respondent has suggested many difficulties and absurdities claimed to be incidental to such course of procedure. Most of them certainly will not arise in this case and they probably never will in any other. Of course an appraisal based upon an apportionment of the entire property of the consolidated company between the New York and Massachusetts corporations may be made a source of much labor and expense if the parties so desire. Possibly it might be carried to the extent of a detailed inventory and valuation of innumerable pieces of property. Upon the other hand, an apportionment based upon trackage or figures drawn from the books or balance sheets of the company may doubtless be easily reached which will be substantially correct, and any inaccuracies of which when reflected in a tax of one per cent upon 426 shares of stock will be inconsequential.

The order of the Appellate Division and of the Surrogate's Court of the county of New York should be reversed, with costs, and the proceedings remitted to said Surrogate's Court for a reappraisal of the stock in question in accordance with the views herein expressed.

CULLEN, Ch. J., GRAY, O'BRIEN, and EDWARD T. BARTLETT, JJ., concur; WERNER and CHASE, JJ., dissent.

Order reversed, etc.

## SECTION III.

## TEMPORARY PRESENCE.

## CALDWELL v. VAN VLISSENGEN.

CHANCERY. 1851.

[*Reported 9 Hare, 415.*]

TURNER, V. C.<sup>1</sup> The plaintiffs in these causes are the assignees of a patent granted to James Lowe in the year 1838, for a mode of propelling vessels by means of one or more curved blades set or affixed on a revolving shaft below the water-line of the vessel, and running from stem to stern of the vessel. The defendants in the first two causes are owners of vessels trading between Holland and this country, and the defendant in the third cause was the captain of a vessel engaged in the same trade. . . .

It was insisted, on the part of the defendants, that there was in each of these cases a sufficient ground for the interference of the court being withheld. In the first place, the ground is thus stated in the affidavit of Izebbe Swart, of Amsterdam. He says, in his affidavit, that he is the master of the ship called the Burgemeester Huidekoper, . . . that the vessel belongs to a company formed in Holland; . . . that some time before the vessel was built and fitted, the same propelling power with that used for the vessel had been openly used and exercised in Holland; . . . that no patent has been granted, or, as he is informed and believes, applied for in Holland, for or in respect of such alleged invention. . . .

It is to be observed, that in none of these cases is it attempted to be denied, on the part of the defendants, that the screw propellers used in their respective vessels fall within the invention claimed by this patent; and after anxiously considering the case, I am of opinion that I cannot withhold these injunctions, upon the grounds which are stated.

I take the rule to be universal, that foreigners are in all cases subject to the laws of the country in which they may happen to be; and if in any case, when they are out of their own country, their rights are regulated and governed by their own laws, I take it to be not by force of those laws themselves, but by the law of the country in which they may be, adopting those laws as part of their own law for the purpose of determining such rights. Mr. Justice Story, in his Treatise on the "Conflict of Laws," addressing himself to this subject (s. 541), says: "In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate over them, it would

<sup>1</sup> Part of the opinion is omitted. — Ed.

seem clear, upon general principles of international law, that such a right does exist, and the extent to which it should be exercised is a matter purely of municipal arrangement and policy. Huberus lays down the doctrine in his second axiom: 'All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof.' Boullenois says, 'That the sovereign has a right to make laws to bind foreigners in relation to their property within his domains, in relation to contracts and acts done therein, and in relation to judicial proceedings if they implead before his tribunals. And further, that he may of strict right make laws for all foreigners who merely pass through his domains, although commonly this authority is exercised only as to matters of police.' Vattel asserts the same general doctrine, and says that foreigners are subject to the laws of a State while they reside in it." Page 789, 2d edit. Lond. In this country, indeed, the position of foreigners is not left to rest upon this general law, but is provided for by statute; for, by the 32 Hen. VIII., c. 16, s. 9, it is enacted, "that every alien and stranger born out of the King's obeisance, not being denizen, which now or hereafter shall come in or to this realm or elsewhere within the King's dominions, shall, after the 1st of September next coming, be bounden by and unto the laws and statutes of this realm, and to all and singular the contents of the same." Natural justice, indeed, seems to require that this should be the case; when countries extend to foreigners the protection of their laws, they may well require obedience to those laws as the price of that protection. These defendants, therefore, whilst in this country, must, I think, be subject to its laws. . . .

Undoubtedly this grant gives to the grantee a right of action against persons who infringe upon the sole and exclusive right purported to be granted by it. Foreigners coming into this country are, as I apprehend, subject to actions for injuries done by them whilst here to the subjects of the crown. Why, then, are they not to be subject to actions for the injury done by their infringing upon the sole and exclusive right, which I have shown to be granted in conformity with the laws and constitution of this country? And if they are subject to such actions, why is not the power of this court, which is founded upon the insufficiency of the legal remedy, to be applied against them as well as against the subjects of the crown. It was said that the prohibitory words of the patent were addressed only to the subjects of the crown; but these prohibitory words are in aid of the grant and not in derogation of it; and they were probably introduced at a time when the prohibition of the crown could be enforced personally against parties who ventured to disobey it. The language of this part of the patent, therefore, does not appear to me to alter the case.

In the course of the argument upon these motions, I put the question whether, in the case of a railway engine patented in England, and not in Scotland, the engine, if made in Scotland, could be permitted



to run into England; and I might have added, whether, if the invention we are now considering was patented in England and Scotland, and not in Ireland, steamboats propelled by means of it would be permitted to run from Dublin into Holyhead, Bristol, and Glasgow. The answer which I received to this question was, that in the case of patents there was a difference between Scotland and foreign countries; that a prior user in Scotland would, although a prior user in foreign countries would not, invalidate an English patent; but this answer does not appear to me to meet the question. What previous user will invalidate a patent, and what user, if any, can be permitted in contravention of the patent right, are different questions depending on wholly different considerations; the one upon the extent of previous knowledge, the other upon the effect of the grant. . . .

In the argument on the part of the defendants, much was said on the hardship of this court's interfering against them, and upon the inconveniences which would result from it, and some reference was made to the policy of this country; but it must be remembered that British ships certainly cannot use this invention without the license of the patentees, and the burthens incident to such license; and foreigners cannot justly complain that their ships are not permitted to enjoy, without license and without payment, advantages which the ships of this country cannot enjoy otherwise than under license and upon payment. It must be remembered that foreigners may take out patents in this country, and thus secure to themselves the exclusive use of their inventions within her Majesty's dominions; and that if they neglect to do so, they, to this extent, withhold their invention from the subjects of this country. It is to be observed also, that the enforcement of the exclusive right under a patent does not take away from foreigners any privilege which they ever enjoyed in this country; for, if the invention was used by them in this country before the granting of the patent, the patent, I apprehend, would be invalid.

One principal ground of inconvenience suggested was that if foreign ships were restrained from using this invention in these dominions, English ships might equally be restrained from using it in foreign dominions; but I think this argument resolves itself into a question of national policy, and it is for the legislature, and not for the courts, to deal with that question; my duty is, to administer the law and not to make it.<sup>1</sup> . . .

<sup>1</sup> *Acc. Morin v. Goupillat* (Cassation, France), *Journal du Palais*, 1855, 2, 503; *Teschen v. Mohr* (Rouen, 1874), *Journal du Palais*, 1874, 1165. — Ed.

## BROWN v. DUCHESNE.

SUPREME COURT OF THE UNITED STATES. 1857.

[*Reported 19 Howard, 183.*]

TANEY, C. J. This case comes before the court upon a writ of error to the Circuit Court of the United States for the district of Massachusetts.

The plaintiff in error, who was also plaintiff in the court below, brought this action against the defendant for the infringement of a patent which the plaintiff had obtained for a new and useful improvement in constructing the gaff of sailing vessels. The declaration is in the usual form, and alleges that the defendant used this improvement at Boston without his consent. The defendant pleaded that the improvement in question was used by him only in the gaffs of a French schooner, called the "Alcyon," of which schooner he was master; that he (the defendant) was a subject of the Empire of France; that the vessel was built in France, and owned and manned by French subjects; and, at the time of the alleged infringement, was upon a lawful voyage, under the flag of France, from St. Peters, in the island of Miquelon, one of the colonies of France, to Boston, and thence back to St. Peters, which voyage was not ended at the date of the alleged infringement; and that the gaffs he used were placed on the schooner at or near the time she was launched by the builder in order to fit her for sea.

There is also a second plea containing the same allegations, with the additional averment that the improvement in question had been in common use in French merchant vessels for more than twenty years before the "Alcyon" was built, and was the common and well-known property of every French subject long before the plaintiff obtained his patent.

The plaintiff demurred generally to each of these pleas, and the defendant joined in demurrer; and the judgment of the Circuit Court being in favor of the defendant, the plaintiff thereupon brought this writ of error.

The plaintiff, by his demurrer, admits that the "Alcyon" was a foreign vessel, lawfully in a port of the United States for the purposes of commerce, and that the improvement in question was placed on her in a foreign port to fit her for sea, and was authorized by the laws of the country to which she belonged. The question, therefore, presented by the first plea is simply this: whether any improvement in the construction or equipment of a foreign vessel, for which a patent has been obtained in the United States, can be used by such vessel within the jurisdiction of the United States, while she is temporarily there for the purposes of commerce, without the consent of the patentee?

This question depends on the construction of the patent laws. For undoubtedly every person who is found within the limits of a government, whether for temporary purposes or as a resident, is bound by its laws. The doctrine upon this subject is correctly stated by Mr. Justice Story, in his "Commentaries on the Conflict of Laws" (chap. 14, sec. 541), and the writers on public law to whom he refers. A difficulty may sometimes arise in determining whether a particular law applies to the citizen of a foreign country, and intended to subject him to its provisions. But if the law applies to him, and embraces his case, it is unquestionably binding upon him when he is within the jurisdiction of the United States.

The general words used in the clause of the patent laws granting the exclusive right to the patentee to use the improvement, taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal — because it is evident that in many cases it would defeat the object which the legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature, as thus ascertained, according to its true intent and meaning.

Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the government of a power which has been confided to it to be used for the general good — or which would enable individuals to embarrass it, in the discharge of the high duties it owes to the community — unless plain and express words indicated that such was the intention of the legislature.

The patent laws are authorized by that article in the Constitution which provides that Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. The power thus granted is domestic in its character, and necessarily confined within the limits of the United States. It confers no power on Congress to regulate commerce, or the vehicles of commerce which belong to a foreign nation, and occasionally visit our ports in their commercial pursuits. That power and the treaty-making power of the general government are separate and distinct powers from the one of which we are now speaking, and are granted by separate and different clauses, and are in no degree connected with it. And when Congress are legislating to protect authors and inventors, their attention is necessarily attracted to the authority under which they are acting, and it ought not lightly to be presumed that they intended to go beyond it, and exercise another and distinct power conferred on them for a different purpose.

Nor is there anything in the patent laws that should lead to a different conclusion. They are all manifestly intended to carry into execution this particular power. They secure to the inventor a just remuneration from those who derive a profit or advantage, within the United States, from his genius and mental labors.

But the right of property which a patentee has in his invention, and his right to its exclusive use, is derived altogether from these statutory provisions; and this court have always held that an inventor has no right of property in his invention, upon which he can maintain a suit, unless he obtains a patent for it, according to the acts of Congress; and that his rights are to be regulated and measured by these laws, and cannot go beyond them.

But these acts of Congress do not, and were not intended to, operate beyond the limits of the United States; and as the patentee's right of property and exclusive use is derived from them, they cannot extend beyond the limits to which the law itself is confined. And the use of it outside of the jurisdiction of the United States is not an infringement of his rights, and he has no claim to any compensation for the profit or advantage the party may derive from it.

The chief and almost only advantage which the defendant derived from the use of this improvement was on the high seas, and in other places out of the jurisdiction of the United States. The plea avers that it was placed on her to fit her for sea. If it had been manufactured on her deck while she was lying in the port of Boston, or if the captain had sold it there, he would undoubtedly have trespassed upon the rights of the plaintiff, and would have been justly answerable for the profit and advantage he thereby obtained. For, by coming in competition with the plaintiff, where the plaintiff was entitled to the exclusive use, he thereby diminished the value of his property. Justice, therefore, as well as the act of Congress, would require that he should compensate the patentee for the injury he sustained, and the benefit and advantage which he (the defendant) derived from the invention.

But, so far as the mere use is concerned, the vessel could hardly be said to use it while she was at anchor in the port, or lay at the wharf. It was certainly of no value to her while she was in the harbor; and the only use made of it, which can be supposed to interfere with the rights of the plaintiff, was in navigating the vessel into and out of the harbor, when she arrived or was about to depart, and while she was within the jurisdiction of the United States. Now, it is obvious that the plaintiff sustained no damage, and the defendant derived no material advantage, from the use of an improvement of this kind by a foreign vessel in a single voyage to the United States, or from occasional voyages in the ordinary pursuits of commerce; or if any damage is sustained on the one side, or any profit or advantage gained on the other, it is so minute that it is incapable of any appreciable value.

But it seems to be supposed that this user of the improvement was, by legal intendment, a trespass upon the rights of the plaintiff; and

that although no real damage was sustained by the plaintiff, and no profit or advantage gained by the defendant, the law presumes a damage, and that the action may be maintained on that ground. In other words, that there is a technical damage, in the eye of the law, although none has really been sustained.

This view of the subject, however, presupposes that the patent laws embrace improvements on foreign ships, lawfully made in their own country, which have been patented here. But that is the question in controversy. And the court is of opinion that cases of that kind were not in the contemplation of Congress in enacting the patent laws, and cannot, upon any sound construction, be regarded as embraced in them. For such a construction would be inconsistent with the principles that lie at the foundation of these laws; and instead of conferring legal rights on the inventor, in order to do equal justice between him and those who profit by his invention, they would confer a power to exact damages where no real damage had been sustained, and would moreover seriously embarrass the commerce of the country with foreign nations. We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish.

The construction claimed by the plaintiff would confer on patentees not only rights of property, but also political power, and enable them to embarrass the treaty-making power in its negotiations with foreign nations, and also to interfere with the legislation of Congress when exercising its constitutional power to regulate commerce. And if a treaty should be negotiated with a foreign nation, by which the vessels of each party were to be freely admitted into the ports of the other, upon equal terms with its own, upon the payment of the ordinary port charges, and the foreign government faithfully carried it into execution, yet the government of the United States would find itself unable to fulfil its obligations if the foreign ship had about her, in her construction or equipment, anything for which a patent had been granted. And after paying the port and other charges to which she was subject by the treaty, the master would be met with a further demand, the amount of which was not even regulated by law, but depended upon the will of a private individual.

And it will be remembered that the demand, if well founded in the patent laws, could not be controlled or put aside by the treaty. For, by the laws of the United States, the rights of a party under a patent are his private property; and by the Constitution of the United States, private property cannot be taken for public use without just compensation. And in the case I have stated, the government would be unable to carry into effect its treaty stipulations without the consent of the patentee, unless it resorted to its right of eminent domain, and went

through the tedious and expensive process of condemning so much of the right of property of the patentee as related to foreign vessels, and paying him such a compensation therefor as should be awarded to him by the proper tribunal. The same difficulty would exist in executing a law of Congress in relation to foreign ships and vessels trading to this country. And it is impossible to suppose that Congress in passing these laws could have intended to confer on the patentee a right of private property, which would in effect enable him to exercise political power, and which the government would be obliged to regain by purchase, or by the power of its eminent domain, before it could fully and freely exercise the great power of regulating commerce, in which the whole nation has an interest. The patent laws were passed to accomplish a different purpose, and with an eye to a different object; and the right to interfere in foreign intercourse, or with foreign ships visiting our ports, was evidently not in the mind of the legislature, nor intended to be granted to the patentee.

Congress may unquestionably, under its power to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to enter. Yet it may perhaps be doubted whether Congress could by law confer on an individual, or individuals, a right which would in any degree impair the constitutional powers of the legislative or executive departments of the government, or which might put it in their power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations. But however that may be, we are satisfied that no sound rule of interpretation would justify the court in giving to the general words used in the patent laws the extended construction claimed by the plaintiff, in a case like this, where public rights and the interests of the whole community are concerned.

The case of *Caldwell v. Vlissengen* (9 Hare, 416, 9 Eng. L. & Eq. Rep. 51), and the statute passed by the British Parliament in consequence of that decision, have been referred to and relied on in the argument. The reasoning of the Vice-Chancellor is certainly entitled to much respect, and it is not for this court to question the correctness of the decision, or the construction given to the statute of Henry VIII.

But we must interpret our patent laws with reference to our own Constitution and laws and judicial decisions. And the court are of opinion that the rights of property and exclusive use granted to a patentee does not extend to a foreign vessel lawfully entering one of our ports; and that the use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.

In this view of the subject, it is unnecessary to say anything in relation to the second plea of the defendant, since the matters relied on in the first are sufficient to bar the plaintiff of his action, without the aid of the additional averments contained in the second.

The judgment of the Circuit Court must therefore be affirmed.

## CHAPTER III.

### JURISDICTION OF COURTS.

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#### SECTION I.

#### JURISDICTION IN REM.

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#### THE BELGENLAND.

SUPREME COURT OF THE UNITED STATES. 1885.

[*Reported 114 United States, 355.*]

BRADLEY, J.<sup>1</sup> This case grew out of a collision which took place on the high seas between the Norwegian barque "Luna" and the Belgian steamship "Belgenland," by which the former was run down and sunk. Part of the crew of the "Luna," including the master, were rescued by the "Belgenland" and brought to Philadelphia. The master immediately libelled the steamship on behalf of the owners of the "Luna" and her cargo, and her surviving crew, in a cause civil and maritime. . . . The District Court decided in favor of the libellant, and rendered a decree for the various parties interested to the aggregate amount of \$50,278.23. An appeal was taken to the Circuit Court. . . .

A decree was thereupon entered, affirming the decree of the District Court. . . . A reargument was had on the question of jurisdiction, and the court held and decided that the Admiralty Courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners of different nationalities; and overruled the plea to the jurisdiction. 9 Fed. Rep. 576. The case was brought before this court on appeal from the decree of the Circuit Court. See also 108 U. S. 153.

The first question to be considered is that of the jurisdiction of the District Court to hear and determine the cause.

It is unnecessary here, and would be out of place, to examine the question which has so often engaged the attention of the common law courts, whether, and in what cases, the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country. It is very fully dis-

<sup>1</sup> Only so much of the opinion as discusses the question of jurisdiction is given.  
— ED.



cussed in *Mostyn v. Fabrigas*, Cowp. 161, and the notes thereto in 1 Smith's Leading Cases, 340; and an instructive analysis of the law will be found in the elaborate arguments of counsel in the case of the San Francisco Vigilant Committee, *Malony v. Dows*, 8 Abbott Pr. 316, argued before Judge Daly in New York, 1859. We shall content ourselves with inquiring what rule is followed by Courts of Admiralty in dealing with maritime causes arising between foreigners and others on the high seas.

This question is not a new one in these courts. Sir William Scott had occasion to pass upon it in 1799. An American ship was taken by the French on a voyage from Philadelphia to London, and afterwards rescued by her crew, carried to England, and libelled for salvage; and the court entertained jurisdiction. The crew, however, though engaged in the American ship, were British born subjects, and weight was given to this circumstance in the disposition of the case. The judge, however, made the following remarks: "But it is asked, if they were American seamen would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the meantime, I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. For salvage is a question of *jus gentium*, and materially different from the question of a mariner's contract, which is a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases, and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined." *The Two Friends*, 1 Ch. Rob. 271, 278.

The law has become settled very much in accord with these views. That was a case of salvage; but the same principles would seem to apply to the case of destroying or injuring a ship, as to that of saving it. Both, when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are *prima facie* proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious, or injured, parties.

The same question of jurisdiction arose in another salvage case which came before this court in 1804, *Mason v. The Blaireau*, 2 Cranch. 240. There a French ship was saved by a British ship, and brought into a port of the United States; and the question of jurisdiction was raised by Mr. Martin, of Maryland, who, however, did not press the

point, and referred to the observations of Sir William Scott in *The Two Friends*. Chief Justice Marshall, speaking for the court, disposed of the question as follows: "A doubt has been suggested," said he, "respecting the jurisdiction of the court, and upon a reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it." In that case, the objection had not been taken in the first instance, as it was in the present. But we do not see how that circumstance can affect the jurisdiction of the court, however much it may influence its discretion in taking jurisdiction.

For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. This branch of the subject will be found discussed in the following cases: *The Catherina*, 1 Pet. Adm. 104; *The Försöket*, 1 Pet. Adm. 197; *The St. Oloff*, 2 Pet. Adm. 428; *The Golubchick*, 1 W. Rob. 143; *The Nina*, L. R. 2 Adm. and Eccl. 44; s. c. on appeal, L. R. 2 Priv. Co. 38; *The Leon XIII.*, 8 Prob. Div. 121; *The Havana*, 1 Sprague, 402; *The Becherdass Ambaidass*, 1 Lowell, 569; *The Pawashick*, 2 Lowell, 142.

Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. *The Elwin Kreplin*, 9 Blatchford, 438, reversing s. c. 4 Ben. 413; see s. c. on application for mandamus, *Ex parte Newman*, 14 Wall. 152. Many public engagements of this kind have been entered into between our government and foreign States. See *Treaties and Conventions*, Rev. ed., 1873. Index, 1238.

In the absence of such treaty stipulations, however, the case of for-

eign seamen is undoubtedly a special one, when they sue for wages under a contract which is generally strict in its character, and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the ship-owners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for ill-treatment. On general principles of comity, Admiralty Courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified, and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction.

Not alone, however, in cases of complaints made by foreign seamen, but in other cases also, where the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow subjects, as to matters of contract or tort solely affecting themselves and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not. A salvage case of this kind came before the United States District Court of New York in 1848. The master and crew of a British ship found another British ship near the English coast apparently abandoned (though another vessel was in sight), and took off a portion of her cargo, brought it to New York, and libelled it for salvage. The British consul and some owners of the cargo intervened and protested against the jurisdiction, and Judge Betts discharged the case, delivered the property to the owners upon security given, and left the salvors to pursue their remedy in the English courts. One Hundred and Ninety-four Shawls, 1 Abbott Adm. 317.

So in a question of ownership of a foreign vessel, agitated between the subjects of the nation to which the vessel belonged, the English Admiralty, upon objection being made to its jurisdiction, refused to interfere, the consul of such foreign nation having declined to give his consent to the proceedings. The Agincourt, 2 Prob. Div. 239. But in another case, where there had been an adjudication of the ownership under a mortgage in the foreign country, and the consul of that country requested the English court to take jurisdiction of the case upon a libel filed by the mortgagee, whom the owners had dispossessed, the court took jurisdiction accordingly. The Evangelistria, 2 Prob. Div. 241, note.

But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it. See 2 Parsons Ship. and Adm. 226, and cases

cited in notes. In the case of *The Jerusalem*, 2 Gall. 191, decided by Mr. Justice Story, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was intended that the vessel should come to the United States. In this case Justice Story examined the subject very fully, and came to the conclusion that, wherever there is a maritime lien on the ship, an Admiralty Court can take jurisdiction on the principle of the civil law, that in proceedings *in rem* the proper forum is the *locus rei sitæ*. He added: "With reference, therefore, to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy." That, as we have seen, was a case of bottomry, and Justice Story, in answer to the objection that the contract might have been entered into in reference to the foreign law, after showing that such law might be proven here, said: "In respect to maritime contracts, there is still less reason to decline the jurisdiction, for in almost all civilized countries these are in general substantially governed by the same rules."

Justice Story's decision in this case was referred to by Dr. Lushington with strong approbation in the case of *The Golubchick*, 1 W. Rob. 143, decided in 1840, and was adopted as authority for his taking jurisdiction in that case.

In 1839, a case of collision on the high seas between two foreign ships of different countries (the very case now under consideration) came before the English Admiralty. The *Johann Friederich*, 1 W. Rob. 35. A Danish ship was sunk by a Bremen ship, and on the latter being libelled, the respondents entered a protest against the jurisdiction of the court. But jurisdiction was retained by Dr. Lushington, who, amongst other things, remarked: "An alien friend is entitled to sue [in our courts] on the same footing as a British born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatus*, no objection could have been taken." Reference being made to the observations of Lord Stowell in cases of seamen's wages, the judge said: "All questions of collision are questions *communis juris*; but in case of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not. . . . If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return, and, if she did, there is no part of the world to which they might not be sent for their redress."

In the subsequent case of *The Griefswald*, 1 Swabey, 430, decided by the same judge in 1859, which arose out of a collision between a

British barque and a Persian ship in the Dardanelles, Dr. Lushington said: "In cases of collision, it has been the practice of this country, and, so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable."

The subject has frequently been before our own Admiralty Courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it. It was exercised in two cases of collision coming before Mr. Justice Blatchford, while district judge of the Southern District of New York, *The Jupiter*, 1 Ben. 536, and *The Steamship Russia*, 3 Ben. 471. In the former case the law was taken very much for granted; in the latter it was tersely and accurately expounded, with a reference to the principal authorities. Other cases might be referred to, but it is unnecessary to cite them. The general doctrine on the subject is recognized in the case of *The Maggie Hammond*, 9 Wall. 435, 457, and is accurately stated by Chief Justice Taney in his dissenting opinion in *Taylor v. Carryl*, 20 How. 583, 611.

As the assumption of jurisdiction in such cases depends so largely on the discretion of the court of first instance, it is necessary to inquire how far an appellate court should undertake to review its action. We are not without authority of a very high character on this point. In a quite recent case in England, that of *The Leon XIII.*, 8 Prob. Div. 121, the subject was discussed in the Court of Appeal. That was the case of a Spanish vessel libelled for the wages of certain British seamen who had shipped on board of her, and the Spanish consul at Liverpool protested against the jurisdiction of the Admiralty Court on the ground that the shipping articles were a Spanish contract, to be governed by Spanish law, and any controversy arising thereon could only be settled before a Spanish court, or consul. Sir Robert Phillimore held that the seamen were to be regarded for that case as Spanish subjects, and, under the circumstances, he considered the protest a proper one and dismissed the suit. The Court of Appeal held that the judge below was right in regarding the libellants as Spanish subjects; and on the question of reviewing his exercise of discretion in refusing to take jurisdiction of the case, Brett, M. R., said: "It is then said that the learned judge has exercised his discretion wrongly. What then is the rule as regards this point in the Court of Appeal? The plaintiffs must show that the judge has exercised his discretion on wrong principles, or that he has acted so absolutely differently from the view which the Court of Appeal holds, that they are justified in saying he has exercised it wrongly. I cannot see that any wrong principle has been acted on by the learned judge, or anything done in the exercise of his discretion so unjust or unfair as to entitle us to overrule his discretion."

This seems to us to be a very sound view of the subject; and acting on this principle, we certainly see nothing in the course taken by the District Court in assuming jurisdiction of the present case, which calls for animadversion. Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to which the litigants belong. As Judge Deady very justly said, in a case before him in the district of Oregon: "The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found." *Bernhard v. Greene*, 3 Sawyer, 230, 235.

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### ARNDT v. GRIGGS.

SUPREME COURT OF THE UNITED STATES. 1890.

[Reported 134 *United States*, 316.]

BREWER, J. The statutes of Nebraska contain these sections: Sec. 57, chap. 73, Compiled Statutes 1885, p. 483: "An action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." Sec. 58: "All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought, as may be necessary to fully settle or determine the question of title between the parties to said real estate, and to decree the title to the same, or any part thereof, to the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment, or order into effect." Sec. 77, Code of Civil Procedure, Compiled Statutes 1885, p. 637: "Service may be made by publication in either of the following cases: "Fourth. In actions which relate to, or the subject of which is, real or personal property in this State, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the State or a foreign corporation." Sec. 78 of the Code: "Before service can be made by publication,

an affidavit must be filed that service of a summons cannot be made within this State, on the defendant or defendants, to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication." Sec. 82 of the Code: "A party against whom a judgment or decree has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; . . . but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title to any property sold before judgment under an attachment." Sec. 429 b, of the Code: "When any judgment or decree shall be rendered for a conveyance, release, or acquittance, in any court of this State, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformable to such judgment or decree."

Under these sections, in March, 1882, Charles L. Flint filed his petition in the proper court against Michael Hurley and another, alleging that he was the owner and in possession of the tracts of land in controversy in this suit; that he held title thereto by virtue of certain tax deeds, which were described; that the defendants claimed to have some title, estate, interest in, or claim upon the lands by patent from the United States, or deed from the patentee, but that whatever title, estate, or claim they had, or pretended to have, was divested by the said tax deeds, and was unjust, inequitable, and a cloud upon plaintiff's title; and that this suit was brought for the purpose of quieting his title. The defendants were brought in by publication, a decree was entered in favor of Flint quieting his title, and it is conceded that all the proceedings were in full conformity with the statutory provisions above quoted.

The present suit is one in ejectment, between grantees of the respective parties to the foregoing proceedings to quiet title; and the question before us, arising upon a certificate of division of opinion between the trial judges, is whether the decree in such proceedings to quiet title, rendered in accordance with the provisions of the Nebraska statute, upon service duly authorized by them, was valid and operated to quiet the title in the plaintiff therein. In other words, has a State the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court only by publication? The Supreme Court of Nebraska has answered this question in the affirmative. *Watson v. Ulbrich*, 18 Neb. 189 — in which the court says: "The principal question to be determined is whether or not the decree in

favor of Gray, rendered upon constructive service, is valid until set aside. No objection is made to the service, or any proceedings connected with it. The real estate in controversy was within the jurisdiction of the District Court, and that court had authority, in a proper case, to render the decree confirming the title of Gray. In *Castrique v. Imrie*, L. R. 4 H. L. 414, 429, Mr. Justice Blackburn says: 'We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.' The court, therefore, in this case, having authority to render the decree, and jurisdiction of the subject-matter, its decree is conclusive upon the property until vacated under the statutes or set aside."

Section 57, enlarging as it does the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property, has been sustained by this court, and held applicable to suits in the Federal court. *Holland v. Challen*, 110 U. S. 15. But it is earnestly contended that no decree in such a case, rendered on service by publication only, is valid or can be recognized in the Federal courts. And *Hart v. Sansom*, 110 U. S. 151, is relied on as authority for this proposition. The propositions are, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone.

While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the



purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the Federal courts. In *United States v. Fox*, 94 U. S. 315, 320, it was said: "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." See also *McCormick v. Sullivan*, 10 Wheat. 192, 202; *Beauregard v. New Orleans*, 18 How. 497; *Snydam v. Williamson*, 24 How. 427; *Christian Union v. Yount*, 101 U. S. 352; *Lathrop v. Bank*, 8 Dana, 114.

Passing to an examination of the decisions on the precise question it may safely be affirmed that the general, if not the uniform, ruling of State courts has been in favor of the power of the State to thus quiet the title to real estate within its limits. In addition to the case from Nebraska, heretofore cited, and which only followed prior rulings in that State, — *Scudder v. Sargent*, 15 Neb. 102; *Keene v. Sallenbach*, 15 Neb. 200 — reference may be had to a few cases. In *Cloyd v. Trotter*, 118 Ill. 391, the Supreme Court of Illinois held that under the statutes of that State the court could acquire jurisdiction to quiet title by constructive service against non-resident defendants. A similar ruling as to jurisdiction acquired in a suit to set aside a conveyance as fraudulent as to creditors was affirmed in *Adams v. Cowles*, 95 Mo. 501. In *Wunstel v. Landry*, 39 La. Ann. 312, it was held that a non-resident party could be brought into an action of partition by constructive service. In *Essig v. Lower*, 21 Northeastern Rep. 1090, the Supreme Court of Indiana thus expressed its views on the question: "It is also argued that the decree in the action to quiet title, set forth in the special finding, is *in personam* and not *in rem*, and that the court had no power to render such decree on publication. While it may be true that such decree is not *in rem*, strictly speaking, yet it must be conceded that it fixed and settled the title to the land then in controversy, and to that extent partakes of the nature of a judgment *in rem*. But we do not deem it necessary to a decision of this case

to determine whether the decree is *in personam* or *in rem*. The action was to quiet the title to the land then involved, and to remove therefrom certain apparent liens. Section 318, Rev. Stat. 1881, expressly authorizes the rendition of such a decree on publication." This was since the decision in *Hart v. Sansom*, as was also the case of *Dillen v. Heller*, 39 Kansas, 599, in which Mr. Justice Valentine, for the court, says: "For the present we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the only question to be considered is whether the statutes themselves are valid. Or, in other words, we think the question is this: Has the State any power, through the legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the State belonging to non-resident owners out of the State, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the State or to the courts of the State, and where the most urgent public policy and justice require that the State and its courts should assume jurisdiction over such property? Power of this kind has already been exercised, not only in Kansas, but in all the other States. Lands of non-resident owners, as well as of resident owners, are taxed and sold for taxes; and the owners thereby may totally be deprived of such lands, although no notice is ever given to such owners, except a notice by publication, or some other notice of no greater value, force, or efficacy. *Beebe v. Doster*, 36 Kansas, 666, 675, 677; s. c. 14 Pac. Rep. 150. Mortgage liens, mechanics' liens, material-men's liens, and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication. *Gillespie v. Thomas*, 23 Kansas, 138; *Walkenhorst v. Lewis*, 24 Kansas, 420; *Rowe v. Palmer*, 29 Kansas, 337; *Venable v. Dutch*, 37 Kansas, 515, 519. All the States by proper statutes authorize actions against non-residents, and service of summons therein by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are non-residents. We think a sovereign State has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and, generally, within its own boundaries a sovereignty is supreme. Kansas is supreme, except so far as its power and authority are limited by the Constitution and laws of the United States; and within the Constitution and laws of the United States the courts of Kansas may have all the jurisdiction over all persons and things within the State which the constitution and laws of Kansas may give to them; and the mode of obtaining this jurisdiction may be prescribed wholly.

entirely, and exclusively by the statutes of Kansas. To obtain jurisdiction of everything within the State of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service."

Turning now to the decisions of this court: In *Boswell's Lessee v. Otis*, 9 How. 336, 348, was presented a case of a bill for a specific performance and an accounting, and in which was a decree for specific performance and accounting; and an adjudication that the amount due on such accounting should operate as a judgment at law. Service was had by publication, the defendants being non-residents. The validity of a sale under such judgment was in question; the court held that portion of the decree, and the sale made under it, void; but with reference to jurisdiction in a case for specific performance alone, made these observations: "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service or process, it is substantially of that character."

In the case of *Parker v. Overman*, 18 How. 137, 140, the question was presented under an Arkansas statute, a statute authorizing service by publication. While the decision on the merits was adverse, the court thus states the statute, the case and the law applicable to the proceedings under it: "It had its origin in the State court of Dallas County, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object is to quiet the title. The purchaser at such sales is authorized to institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold, and 'calling on all persons who can set up any right to the lands so purchased, in consequence of any informality, or any irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed.' In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But if opposition be made, and it should appear that the sale was made 'contrary to law,' it became the duty of the court to annul it. The judgment or decree, in favor of the grantee in the deed, operates 'as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings.' It is a very great evil in any community to have titles to land insecure and uncertain; and especially in new States, where its result is to retard the settlement and improve-

ment of their vacant lands. Where such lands have been sold for taxes there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a lawsuit, or risk the loss of his money and labor upon a litigious title. The act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property; and, like a proceeding *in rem*, it becomes conclusive against the absent claimant, as well as the present contestant. As was said by the court in *Clark v. Smith*, 13 Pet. 195, 203, with regard to a similar law of Kentucky: 'A State has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and, having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The State legislatures have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the State court.' In the case before us the proceeding, though special in its form, is in its nature but the application of a well known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another State."

In the case of *Pennoyer v. Neff*, 95 U. S. 714, 727, 734, in which the question of jurisdiction in cases of service by publication was considered at length, the court, by Mr. Justice Field, thus stated the law: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. . . . It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned." These cases were all before the decision of *Hart v. Sansom*.

Passing to a case later than that, *Huling v. Kaw Valley Railway*,

130 U. S. 559, 563, it was held that, in proceedings commenced under a statute for the condemnation of lands for railroad purposes, publication was sufficient notice to a non-resident. In the opinion, Mr. Justice Miller, speaking for the court, says: "Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interests, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters. The owner of real estate, who is a non-resident of the State within which the property lies, cannot evade the duties and obligations, which the law imposes upon him in regard to such property, by his absence from the State. Because he cannot be reached by some process of the courts of the State, which, of course, have no efficacy beyond their own borders, he cannot, therefore, hold his property exempt from the liabilities, duties, and obligations which the State has a right to impose upon such property; and in such cases, some substituted form of notice has always been held to be a sufficient warning to the owner, of the proceedings which are being taken under the authority of the State to subject his property to those demands and obligations. Otherwise the burdens of taxation and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every State of the Union." In this connection, it is well to bear in mind, that by the statutes of the United States, in proceedings to enforce any legal or equitable lien, or to remove a cloud upon the title of real estate, non-resident holders of real estate may be brought in by publication, 18 Stat. 472; and the validity of this statute, and the jurisdiction conferred by publication, has been sustained by this court. *Mellen v. Moline Iron Works*, 131 U. S. 352.

These various decisions of this court establish that, in its judgment, a State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication; and that is all that is necessary to sustain the validity of the decree in question in this case.

Nothing inconsistent with this doctrine was decided in *Hart v. Sansom*, *supra*. The question there was as to the effect of a judgment. That judgment was rendered upon a petition in ejectment against one Wilkerson. Besides the allegations in the petition to sustain the ejectment against Wilkerson, were allegations that other defendants named had executed deeds, which were described, which were clouds upon plaintiffs' title; and in addition an allegation that the defendant Hart set up some pretended claim of title to the land. This was the only averment connecting him with the controversy. Publication was made

against some of the defendants, Hart being among the number. There was no appearance, but judgment upon default. That judgment was, that the plaintiffs recover of the defendants the premises described; "that the several deeds in plaintiffs' petition mentioned be, and the same are, hereby annulled and cancelled, and for naught held, and that the cloud be thereby removed;" and for costs, and that execution issue therefor. This was the whole extent of the judgment and decree. Obviously in all this there was no adjudication affecting Hart. As there was no allegation that he was in possession, the judgment for possession did not disturb him; and the decree for cancellation of the deeds referred specifically to the deeds mentioned in the petition, and there was no allegation in the petition that Hart had anything to do with those deeds. There was no general language in the decree quieting the title as against all the defendants; so there was nothing which could be construed as working any adjudication against Hart as to his claim and title to the land. He might apparently be affected by the judgment for costs, but they had no effect upon the title. So the court held, for it said: "It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removes the cloud upon the plaintiffs' title appears to be limited to the cloud created by the deeds mentioned in the petition, and the petition does not allege, and the verdict negatives, that Hart held any deed."

An additional ground assigned for the decision was that if there was any judgment (except for costs) against Hart, it was, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and therefore, according to the ordinary and undisputed rule in equity, was not a judgment *in rem*, establishing against him a title in the land. But the power of the State, by appropriate legislation, to give a greater effect to such a decree was distinctly recognized, both by the insertion of the words "unless otherwise expressly provided by statute," and by adding: "It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." And of course it follows that if a State has power to bring in a non-resident by publication for the purpose of appointing a trustee, it can, in like manner, bring him in and subject him to a direct decree. There was presented no statute of the State of Texas providing directly for quieting the title of lands within the State, as against non-residents, brought in only by service by publication, such as we have in the case at bar, and the only statute cited by counsel or referred to in the opinion was a mere general provision for bringing in non-resident defendants in any case by publication; and it was not the intention of the court to overthrow that series of earlier authorities heretofore referred to, which affirm the

power of the State, by suitable statutory proceedings, to determine the titles to real estate within its limits, as against a non-resident defendant, notified only by publication.

It follows, from these considerations, that the first question presented in the certificate of division, the one heretofore stated, and which is decisive of this case, must be answered in the affirmative.<sup>1</sup>

## TYLER *v.* JUDGES OF THE COURT OF REGISTRATION.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1900

[*Reported 175 Massachusetts, 71.*]

HOLMES, C. J. This is a petition for a writ of prohibition against the judges of the Court of Registration, established by St. 1898, c. 562, and is brought to prevent their proceeding upon an application concerning land in which the petitioner claims an interest. The ground of the petition is that the act establishing the court is unconstitutional. Two reasons are urged against the act, both of which are thought to go to the root of the statute, and to make action under it impossible. The first and most important is, that the original registration deprives all persons except the registered owner of any interest in the land, without due process of law. There is no dispute that the object of the system, expressed in sect. 38, is, that the decree of registration "shall bind the land and quiet the title thereto," and "shall be conclusive upon and against all persons," whether named in the proceedings or not, subject to few and immaterial exceptions; and, this being admitted, it is objected that there is no sufficient process against, or notice to, persons having adverse claims, in a proceeding intended to bar their possible rights.

The application for registration is to be in writing, and signed and sworn to. It is to contain an accurate description of the land, to set forth clearly other outstanding estates or interests known to the petitioner, to identify the deed by which he obtained title, to state the name and address of the occupant, if there is one, and also to give the names and addresses, so far as known, of the occupants of all lands adjoining (sect. 21). As soon as it is filed, a memorandum containing a copy of the description of the land concerned is to be filed in the registry of deeds (sect. 20). The case is immediately referred to an examiner appointed by the judge (sect. 12), who makes as full an investigation as he can, and reports to the court (sect. 29). If, in the opinion of the examiner, the applicant has a good title, as alleged, or if the applicant, after an adverse opinion, elects to proceed further, the

<sup>1</sup> *Acc.* *McLaughlin v. McCrory*, 55 Ark. 442, 18 S. W. 762; *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707; *Felch v. Hooper*, 119 Mass. 52; *Short v. Caldwell*, 155 Mass. 57, 28 N. E. 1124. — *Ed.*

recorder is to publish a notice, by order of the court, in some newspaper published in the district where any portion of the land lies. This notice is to be addressed, by name, to all persons known to have an adverse interest, and to the adjoining owners and occupants, so far as known, and to all whom it may concern. It is to contain a description of the land, the name of the applicant, and the time and place of the hearing (sect. 31). A copy is to be mailed to every person named in the notice whose address is known, and a duly attested copy is to be posted in a conspicuous place on each parcel of land included in the application, by a sheriff or deputy sheriff, fourteen days at least before the return day. Further notice may be ordered by the court (sect. 32).

It will be seen that the notice is required to name all persons known to have an adverse interest, and this, of course, includes any adverse claim, whether admitted or denied, that may have been discovered by the examiner, or in any way found to exist. Taking this into account, we should construe the requirement in sect. 21, concerning the application, as calling upon the applicant to mention, not merely outstanding interests which he admits, but equally all claims of interest set up, although denied by him. We mention this here to dispose of an objection of detail urged by the petitioner, and we pass to the general objection that, however construed, the mode of notice does not satisfy the constitution, either as to persons residing within the State upon whom it is not served, or as to persons residing out of the State and not named.

If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claims, — indeed, certainty against the unknown may be said to be its chief end; and unknown claims cannot be dealt with by personal service upon the claimant. It seems to have been the impression of the Supreme Court of Ohio, in the case most relied upon by the petitioner, that such a judicial proceeding is impossible in this country. *State v. Guilbert*, 56 Ohio St. 575, 629, 47 N. E. 551. But we cannot bring ourselves to doubt that the constitutions of the United States and of Massachusetts at least permit it as fully as did the common law. Prescription or a statute of limitations may give a title good against the world, and destroy all manner of outstanding claims, without any notice or judicial proceeding at all. Time, and the chance which it gives the owner to find out that he is in danger of losing rights, are due process of law in that case. *Wheeler v. Jackson*, 137 U. S. 245, 258. The same result used to follow upon proceedings which, looked at apart from history, may be regarded as standing half-way between statutes of limitations and true judgments *in rem*, and which took much less trouble about giving notice than the statute before us. We refer to the effect of a judgment on a writ of right after the *mise* joined and the lapse of a year and a day (Booth, Real Act. 101, in margin; Fitzh. Abr. "Continual Claim," pl. 7; Faux Recovere, pl. 1; Y. B. 5 Edw. III. 51,



pl. 60); and of a fine, with proclamations after the same time; or by a later statute after five years (2 Bl. Comm. 354; 2 Inst. 510, 518; St. 18 Edw. I., "Modus Levandi Fines;" St. 34 Edw. III. c. 16; St. 4 Hen. VII. c. 24; St. 32 Hen. VIII. c. 36). It would have astonished John Adams to be told that the framers of our constitution had put an end to the possibility of these ancient institutions. A somewhat similar statutory contrivance of modern days has been held good. *Turner v. People*, 168 U. S. 90. Finally, as was pointed out by the counsel for the petitioners, a proceeding *in rem*, in the proper sense of the words, might give a clear title without other notice than a seizure of the *res* and an exhibition of the warrant to those in charge. 2 Browne, Civil Law, 398. The general requirement of advertisement in admiralty cases is said to be due to rules of court. U. S. Adm. Rule 9; *Betts*, Adm. (1838) 33, 34, App. 14.

The prohibition in the Fourteenth Amendment against a State depriving any person of his property without due process of law, and that in the twelfth article of the Massachusetts Bill of Rights, refer to somewhat vaguely determined *criteria* of justification, which may be found in ancient practice (*Murray's Lessee v. Improvement Co.*, 18 How. 272, 277); or which may be found in convenience and substantial justice, although the form is new. (*Hurtado v. California*, 110 U. S. 516, 528, 531; *Holden v. Hardy*, 169 U. S. 366, 388, 389.) The prohibitions must be taken largely with a regard to substance rather than to form, or they are likely to do more harm than good. It is not enough to show a procedure to be unconstitutional to say that we never have heard of it before. *Hurtado v. California*, 110 U. S. 516, 537. Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding *in rem*, dealing with a tangible *res*, may be instituted and carried to judgment without personal service upon claimants within the State, or notice by name to those outside of it, and not encounter any provision of either constitution. Jurisdiction is secured by the power of the court over the *res*. As we have said, such a proceeding would be impossible were this not so; for it hardly would do to make a distinction between the constitutional rights of claimants who were known and those who were not known to the plaintiff, when the proceeding is to bar all. *Pennoyer v. Neff*, 95 U. S. 714, 727; "The Mary," 9 Cranch, 126, 144; *Mankin v. Chandler*, 2 Brock. 125, 127, Fed. Cas. No. 9030; *Brown v. Board*, 50 Miss. 468, 481, 2 Freem. Judgm. (4th ed.) §§ 606, 611. In *Hamilton v. Brown*, 161 U. S. 256, a judgment of escheat was held conclusive upon persons notified only by advertisement, to all persons interested. It is true that the statute under consideration required the petition to name all known claimants, and personal service to be made on those so named. But that did the plaintiffs no good, as they were not named. So, a decree allowing or disallowing a will binds everybody, although the only notice of the proceedings given be a general notice to all persons interested. And in this case, as in that of escheat just cited, the con-

clusive effect of the decree is not put upon the ground that the State has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding *in rem*. *Bonnemort v. Gill*, 167 Mass. 338, 340, 45 N. E. 768. See 161 U. S. 263, 274. Admiralty proceedings need only to be mentioned in this connection, and further citation of cases seems unnecessary.

Speaking for myself, I see no reason why what we have said as to proceedings *in rem* in general should not apply to such proceedings concerning land. In *Arndt v. Griggs*, 134 U. S. 316, 327, it is said to be established that "a State has power, by statute, to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication." In *Hamilton v. Brown*, 161 U. S. 256, 274, it was declared to be within the power of a State "to provide for determining and quieting the title to real estate within the limits of the State, and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons." I doubt whether the court will not take the further step when necessary, and declare the power of the States to do the same thing after notice by publication alone. See *Huling v. Improvement Co.*, 130 U. S. 559, 564; *Parker v. Overman*, 18 How. 137, 140, 141. But in the present case provision is made for notice to all known claimants by the recorder, who is to mail a copy of the published notice to every person named therein whose address is known (sect. 32). We shall state in a moment one reason for thinking this form of notice constitutional. See, further, *Cook v. Allen*, 2 Mass. 462, 469, 470; *Dascomb v. Davis*, 5 Met. 335, 340; *Brock v. Railroad Co.*, 146 Mass. 194, 195, 15 N. E. 555.

But it is said that this is not a proceeding *in rem*. It is certain that no phrase has been more misused. In the past it has had little more significance than that the right alleged to have been violated was a right *in rem*. Austin thinks it necessary to quote Leibnitz for the sufficiently obvious remark that every right to restitution is a right *in personam*. So as to actions. If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is *in personam*, although it may concern the right to, or possession of, a tangible thing. *Mankin v. Chandler*, 2 Brock. 125, 127, Fed. Cas. No. 9030. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*. 2 Freem. Judgm. (4th ed.) § 606, *ad fin*. All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected.

Hence the *res* need not be personified, and made a party defendant, as happens with the ship in the admiralty. It need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming the *res* as defendant are mere symbols, not the essential matter. They are fictitious, conveniently expressing the nature of the process and the result, nothing more.

It is true, as an historical fact, that these symbols are used in admiralty proceedings; and also, again, merely as an historical fact, that proceedings *in rem* have been confined to cases where certain classes of claims, although of very divers sorts, for indemnification for injury, for wages, for salvage, etc., are to be asserted. But a ship is not a person. It cannot do a wrong or make a contract. To say that a ship has committed a tort is merely a shorthand way of saying that you have decided to deal with it as if it had committed one, because some man has committed one in fact. There is no *à priori* reason why any other claim should not be enforced in the same way. If a claim for a wrong committed by a master may be enforced against all interests in the vessel, there is no juridical objection to a claim of title being enforced in the same way. The fact that it is not so enforced under existing practice, affords no test of the powers of the legislature. The contrary view would indicate that you really believed the fiction that a vessel had an independent personality as a fact behind the law. Furthermore, naming the *res* as defendant, although a convenient way of indicating that the proceeding is against property alone, — that is to say, that it is not to establish an infinite personal liability, — is not of the essence. If, in fact, the proceeding is of that sort, and is to bar all the world, it is a proceeding *in rem*.

So, as to seizure of the *res*. It is convenient in the case of a vessel, in order to secure its being on hand to abide judgment, although in the case of a suit against a man jurisdiction is regarded as established by service, without the need of keeping him in prison to await judgment. It is enough that the personal service shows that he could have been seized and imprisoned. Seizure, to be sure, is said to be notice to the owner. *Scott v. Shearman*, 2 W. Bl. 977, 979; *Mankin v. Chandler*, 2 Brock. 125, 127, Fed. Cas. No. 9030. But fastening the process or a copy to the mast would seem not necessarily to depend for its effect upon the continued custody of the vessel by the marshal. However this may be, when we come to deal with immovables, there would be no sense whatever in declaring seizure to be a constitutional condition of the power of the legislature to make a proceeding *in rem*. *Hamilton v. Brown*, 161 U. S. 256, 274. The land cannot escape from the jurisdiction, and, except as security against escape, seizure is a mere form of no especial sanctity, and of much possible inconvenience.

I do not wish to ignore the fact that seizure, when it means real dispossession, is another security for actual notice. But when it is considered how purely formal such an act may be, and that even adverse possession is possible without ever coming to the knowledge of

a reasonably alert owner, I cannot think that the presence or absence of the form makes a constitutional difference; or, rather, to express my view still more cautiously, I cannot but think that the immediate recording of the claim is entitled to equal effect from a constitutional point of view. I am free to confess, however, that, with the rest of my brethren, I think the act ought to be amended in the direction of still further precautions to secure actual notice before a decree is entered, and that, if it is not amended, the judges of the court ought to do all that is in their power to satisfy themselves that there has been no failure in this regard before they admit a title to registration.

The quotations which we have made show the intent of the statute to bind the land, and to make the proceedings adverse to all the world, even if it were not stated in sect. 35, or if the amendment of 1899 did not expressly provide that they should be proceedings *in rem*. St. 1899, c. 131, § 1. Notice is to be posted on the land just as admiralty process is fixed to the mast. Any person claiming an interest may appear and be heard (sect. 34).

But perhaps the classification of the proceeding is not so important as the course of the discussion thus far might seem to imply. I have pursued that course as one which is satisfactory to my own mind; but, for the purposes of decision, a majority of the court prefer to assume that in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent, in order to render a valid judgment against them, it is not in the power of the legislature, by changing the form of the proceeding from an action *in personam* to a suit *in rem*, to avoid the necessity of giving such a notice, and to assume that, under this statute, personal rights in property are so involved, and may be so affected, that effectual notice, and an opportunity to be heard, should be given to all claimants who are known, or who by reasonable effort can be ascertained.

It would hardly be denied that the statute takes great precautions to discover outstanding claims, as we already have shown in detail, or that notice by publication is sufficient with regard to claimants outside the State. With regard to claimants living within the State, and remaining undiscovered, notice by publication must suffice, of necessity. As to claimants living within the State and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice of a suit by a messenger and sending it by the post-office, besides publishing in a newspaper, recording in the registry, and posting on the land. It must be remembered that there is no constitutional requirement that the summons, even in a personal action, shall be served by an officer, or that the copy served shall be officially attested. Apart from local practice, it may be served by any indifferent person. It may be served on residents by leaving a copy at the last and usual place of abode. When we are considering a proceeding of this kind, it seems to us within the power of the legislature to say

that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice, when other means of notifying the party, like publishing and posting, also are required. We agree that such an act as this is not to be upheld without anxiety. But the difference in degree between the case at bar and one in which the constitutionality of the act would be unquestionable seems to us too small to warrant a distinction. If the statute is within the power of the legislature, it is not for us to criticise the wisdom or expediency of what the legislature has done.

We do not think it necessary to refer to the elaborate collection of statutes presented by the attorney-general for the purpose of showing that the principle of the present act is old. Although no question is made on that point, we may mention that an appeal is given to the Superior Court, with the right to claim a jury. In our opinion, the main objection to the act fails. See *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773; *People v. Simon*, 176 Ill. 165, 52 N. E. 910; *Short v. Caldwell*, 155 Mass. 57, 59, 28 N. E. 1124; *Loring v. Hildreth*, 170 Mass. 328, 49 N. E. 652.<sup>1</sup>

LORING and LATHROP, JJ., dissented.

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## SECTION II.

### PERSONAL JURISDICTION.

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## BUCHANAN v. RUCKER.

KING'S BENCH. 1808.

[*Reported 9 East, 192.*]

THE plaintiff declared in assumpsit for £2,000 on a foreign judgment of the Island Court in Tobago; and at the trial (*Vide* 1 Campbell's Ni. Pri. Cas. 63) before Lord Ellenborough, C. J., at Guildhall, produced a copy of the proceedings and judgment, certified under the handwriting of the Chief Justice and the seal of the island, which were proved; which, after containing an entry of the declaration, set out a summons to the defendant, therein described as "formerly of the city of Dunkirk, and now of the city of London, merchant," to appear at the ensuing court to answer the plaintiff's action; which summons was returned "served, etc., by nailing up a copy of the declaration at the court-house door," etc., on which judgment was afterwards given by default. Whereupon it was objected, that the judgment was obtained against the defendant, who never appeared to have been within the limits of the island, nor to have had any attorney there; nor to have been in any other way subject to the jurisdiction of

<sup>1</sup> The remainder of the opinion and the dissenting opinion are omitted. — ED.

the court at the time ; and was therefore a nullity. And of this opinion was Lord Ellenborough ; though it was alleged (of which however there was no other than parol proof) that this mode of summoning absentees was warranted by a law of the island, and was commonly practised there ; and the plaintiff was thereupon nonsuited. And now

*Taddy* moved to set aside the nonsuit, and for a new trial, on an affidavit verifying the island law upon this subject, which stated, "That every defendant against whom any action shall be entered, shall be served with a summons and an office copy of the declaration, with a copy of the account annexed, if any, at the same time, by the Provost Marshal, etc., six days before the sitting of the next court, etc. ; and the Provost Marshal is required to serve the same on each defendant in person. But if such defendant cannot be found, and is not absent from the island ; then it shall be deemed good service by leaving the summons, etc., at his most usual place of abode. And if the defendant be absent from the island, and hath a power of attorney recorded in the secretary's or registrar's office of Tobago, and the attorney be resident in the island, or any manager or overseer on his plantation in the island, the service shall be either upon such attorney personally, or by leaving it at his last place of abode, or upon such overseer or manager personally, or by leaving it at the house upon the defendant's plantation where the overseer or manager usually resides. But if no such attorney, overseer, or manager, then the nailing up a copy of the declaration and summons at the entrance of the court-house shall be held good service."

LORD ELLENBOROUGH, C. J. There is no foundation for this motion even upon the terms of the law disclosed in the affidavit. By persons absent from the island must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the court ; but it can never be applied to a person who for aught appears never was present within or subject to the jurisdiction. Supposing, however, that the act had said in terms, that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the court door : how could that be obligatory upon the subjects of other countries ? Can the island of Tobago pass a law to bind the rights of the whole world ? Would the world submit to such an assumed jurisdiction ? The law itself, however, fairly construed, does not warrant such an inference : for "absent from the island" must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the court out of which the process issued ; and as nothing of that sort was in proof here to show that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit in law upon the judgment so obtained. *Per Curiam.* *Rule refused.*<sup>1</sup>

<sup>1</sup> *Acc.* Wood v. Watkinson, 17 Conn. 500 ; Howell v. Gordon, 40 Ga. 302 ; Beard v. Beard, 21 Ind. 321 ; Rand v. Hanson, 154 Mass. 87 ; Cocke v. Brewer, 68 Miss.

## DOUGLAS v. FORREST.

COURT OF COMMON PLEAS. 1828.

*[Reported 4 Bingham, 686.]*

BEST, C. J.<sup>1</sup> This was an action brought by the assignees of Stein and Co., bankrupts, against the executor of the will of John Hunter.

On the 31st May, 1799, the testator acknowledged himself to be indebted to Stein and Co. in the sum of £447 6s. 3d.; and on the 11th June, in the same year, he acknowledged that he owed £75 to Robert Smith, one of the bankrupts, and one of the firm of Stein and Co. These debts were contracted in Scotland, of which country the deceased was a native, and in which he had a heritable property. Shortly after the year 1799, the deceased went to India. He died in India in 1817, having never revisited Scotland.

On the 25th February, 1802, two decrees were pronounced in the Court of Session in Scotland against the deceased, one at the instance of Stein and Co., and the other at the instance of Robert Smith. In the first of these the deceased was ordered to pay to Stein and Co. £447 6s. 3d., with interest, from the day of        besides expenses of process, etc. In the second decree the deceased was ordered to pay Robert Smith the sum of £75, with interest, from the        of        , besides expenses of process, etc. It appeared, from these decrees, that the deceased was out of Scotland at the time the proceedings were instituted in these causes. He never had any notice of those proceedings. The decrees stated, that the deceased had been (according to the law of Scotland) summoned at the market cross of Edinburgh, and at the pier and shore of Leith. A Scotch advocate proved, that, by the law of Scotland, the Court of Session might pronounce judgment against a native Scotchman who had heritable property in that country, for a debt contracted in Scotland, although the debtor had no notice of any of the proceedings, and was out of Scotland at the time. After such proclamations as were mentioned in these decrees had been made, the same witness proved, that a person against whom such a decree was pronounced might, at any time within forty years, dispute the merits of such decree; but that after the expiration of forty years, it was conclusive against him, and all who claimed under him.

By a decree of the Court of Session, of the date of the 5th July, 1804, that court adjudged that certain property which the deceased possessed in Scotland should belong to Robert Smith and his heirs, in payment and satisfaction of the sum of £75, with interest, from the 11th June, 1799. By another decree of the same date, the Court of Sessions

775, 9 So. 823; Whittier v. Wendell, 7 N. H. 257; Schwinger v. Hickok, 53 N. Y. 280; Price v. Schaeffer, 161 Pa. 530, 29 Atl. 279. — Ed.

<sup>1</sup> Part of the opinion is omitted. — Ed.

adjudged, that certain other property of the deceased in Scotland should belong to Stein and Co. and their heirs, in payment and satisfaction of the sum of £447 6s. 3d., with interest, from the 11th of June, 1799. The two last decrees fill up the blanks left in the first decrees, by giving the time from which interest was to be paid on the debts, namely, from the 11th June, 1799; and if the plaintiffs can maintain their action, entitles them to a verdict for the sum of £862. The terms in which the two last decrees are expressed, seem to import that the lands adjudged to Stein and Co. and Smith were given to and accepted by them, in satisfaction of these debts; but this cannot be the true construction of these decrees, because none of the decrees are conclusive against the deceased and those who claim under him, until the expiration of forty years from the time of pronouncing the two first decrees. The advocate who was examined in the cause proved, that by the law of Scotland, these decrees would not operate as satisfaction of the debts, during the period that the debtor had a right to dispute the validity of the first judgments. A Scotch statute, which we have looked into, shows the accuracy of the opinion given to us on the Scotch laws by the learned advocate; and I feel it due to him to say, that, from the manner in which he gave his evidence, the clearness and precision with which he explained the grounds of his opinion, I have no doubt that he is extremely well acquainted with the Scotch law, and that we may safely rely on every part of his evidence.

The two last decrees, proving that interest was to run from 1799, and the testimony of the learned advocate, who proved, that when decrees adjudged that interest should be paid, but did not show the time from which it was to run, interest was payable from the time of the citation,—disposes of the objection that no interest could be recovered upon these decrees.

The plaintiffs rested their claim on these decrees. The defendant insisted that these decrees would not support an action in our courts, because they were repugnant to the principles of justice, having been pronounced whilst the deceased was at a great distance from Scotland, and without any notice given to him that any proceedings were instituted against him. This defence was made on the general issue. The defendant also pleaded, that the plaintiff's cause of action did not accrue within six years before the commencement of the suit. To this there was a replication, that the deceased, at the time when the cause of action accrued, was beyond seas, and remained beyond the seas until the year 1817, when he died; and that the plaintiffs sued out their writ against the defendant within six years after he first took on himself the burthen and execution of the will of the deceased in Great Britain, and that he had no other executor in Great Britain. This replication was fully proved, and, therefore, the issue taken on it was properly found for the plaintiffs.

The questions to be decided are, first, whether an action can be maintained in England on these judgments of the Court of Session in



Scotland; secondly, whether the replication is an answer to the pleas of the statute of limitations.

On the first question we agree with the defendant's counsel, that if these decrees are repugnant to the principles of universal justice, this court ought not to give effect to them; but we think that these decrees are perfectly consistent with the principles of justice. If we held that they were not consistent with the principles of justice, we should condemn the proceedings of some of our own courts. If a debt be contracted within the city of London, and the creditor issues a summons against the debtor to which a return is made, that the debtor hath nothing within the city by which he may be summoned, or, in plainer words, hath nothing by the seizure of which his appearance may be enforced, goods belonging to the debtor in the hands of a third person, or money due from a third person to the debtor, may be attached; and unless the debtor appears within a year and a day, and disputes his debt, he is forever deprived of his property or the debts due to him.

In such cases the defendant may be in the East Indies whilst the proceedings are going on against him in a court in London, and may not know that any such proceedings are instituted. Instead of the forty years given by the Scotch law, he has only one year given to him to appear and prevent a decision that finally transfers from him his property. Lord Chief Justice De Grey thought this custom of foreign attachment was an unreasonable one, but it has existed from the earliest times in London, and in other towns in England, and in many of our colonies from their first establishment. Lord Chief Justice De Grey and the Court of Common Pleas, after much consideration, decided against the validity of the attachment, according to the report of *Fisher v. Lane* in 3 Wilson, 297, because the party objecting to it had never been summoned or had notice. The report of the same case in 2 Blackstone, 834, shows that the court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but a summons with a return of *nihil*; that is, such a summons as I have mentioned, namely, one that shows that the debtor is not within the city, and has nothing there, by the seizing of which he may be compelled to appear. The 54 G. III. c. 137 not only recognizes the practices on which these decrees are founded, as being according to the law of Scotland, but enacts, that on notices being given at the market cross at Edinburgh, and on the pier and shore of Leith, to debtors out of the kingdom, in default of their appearance the creditors may issue a sequestration against their effects. Can we say that a practice which the legislature of the United Kingdom has recognized and extended to other cases is contrary to the principles of justice?

A natural-born subject of any country, quitting that country, but leaving property under the protection of its law, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation.

The deceased, before he left his native country, acknowledged, under

his hand, that he owed the debts; he was under a moral obligation to discharge those debts as soon as he could. It must be taken for granted, from there being no plea of *plene administravit*, that the deceased had the means of paying what was due to the bankrupts. The law of Scotland has only enforced the performance of a moral obligation, by making his executor pay what he admitted was due, with interest during the time that he deprived his creditors of their just debts.

The reasoning of Lord Ellenborough, in the case of *Buchanan v. Rucker* (1 Campb. 63, and 9 East, 192), is in favor of these decrees. Speaking of a case decided by Lord Kenyon, his Lordship says, in that case the defendant had property in the island, and might be considered as virtually present. The court decided against the validity of the attachment, because it did not appear that the party attached ever was in the island, or had any property in it. In both these respects that case is unlike the present. In the case of *Cavan v. Stewart*, Lord Ellenborough says, you must prove him summoned, or, at least, that he was once in the island of Jamaica, when the attachment issued.

To be sure if attachments issued against persons who never were within the jurisdiction of the court issuing them could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it.

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### SCHIBSBY v. WESTENHOLZ.

QUEEN'S BENCH. 1870.

[*Reported Law Reports*, 6 *Queen's Bench*, 155.]

BLACKBURN, J. This was an action on a judgment of a French tribunal given against the defendants for default of appearance.

The pleas to the action were, amongst others, a plea of never indebted, and, thirdly, a special plea asserting that the defendants were not resident or domiciled in France, or in any way subject to the jurisdiction of the French court, nor did they appear; and that they were not summoned, nor had any notice or knowledge of the pending of the proceedings, or any opportunity of defending themselves therefrom. On these pleas issue was joined.

On the trial before me the evidence of a French *avocat* was given, by which it appeared that by the law of France a French subject may sue a foreigner, though not resident in France, and that for this purpose an alien, if resident in France, was considered by the French law as a French subject.<sup>1</sup> The mode of citation in such a case, according to the French law, is by serving the summons on the *Procureur Impérial*. If the foreign defendant thus cited does not within one month appear, judgment may be given against him, but he may still, at any time within two months after judgment, appear and be heard on the merits. After that lapse of time the judgment is final and conclusive. The practice of the imperial government is, in such a case, to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; but this, as was explained by the *avocat*, is not required by the French law, but is simply done by the imperial government voluntarily from a regard to fair dealing.

It appeared by other evidence that the plaintiff in this case was a Dane resident in France. The defendants were also Danes, resident in London and carrying on business there. A written contract had been made between the plaintiff and defendants, which was in English, and dated in London, but no distinct evidence was given as to where it was signed. We think, however, that, if that was material, the fair intendment from the evidence was that it was made in London. By this contract the defendants were to ship in Sweden a cargo of Swedish oats free on board a French or Swedish vessel for Caen, in France, at a certain rate for all oats delivered at Caen. Payment was to be made on receipt of the shipping documents, but subject to correction for excess or deficiency according to what might turn out to be the delivery at Caen. From the correspondence it appeared that the plaintiff asserted, and the defendants denied, that the delivery at Caen was short of the quantity for which the plaintiff had paid, and that the plaintiff made some other complaints as to the condition of the cargo, which were denied by the defendants. The plaintiff very plainly told the defendants that if they would not settle the claim he would sue them in the French courts. He did issue process in the manner described, and the French consulate in London served on the defendants a copy of the citation.

The following admissions were then made, namely: that the judgment was regular according to French law; that it was given in favor of the plaintiff, a foreigner domiciled in France, against the defendants,

<sup>1</sup> See Article 14 of the Code Civil: "L'étranger même non résidant en France pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un français; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des français."

Codes Annotés de Sirey: Code Civil, Art. 14, Note 42: "Un étranger qui a une maison de commerce établie et patente en France, peut, aussi bien qu'un français, assigner un autre étranger devant un tribunal français."

domiciled in England, and in no sense French subjects, and having no property in France.

I then ruled that I could not enter into the question whether the French judgment was according to the merits, no fraud being alleged or shown.

I expressed an opinion (which I have since changed) that, subject to the third plea, the plaintiff was entitled to the verdict, but reserved the point.

The jury found that the defendants had notice and knowledge of the summons and the pendency of the proceedings in time to have appeared and defended the action in the French court. I then directed the verdict for the plaintiff, but reserved leave to enter the verdict for the defendants on these facts and this finding.

No question was raised at the trial as to the sufficiency of the pleas to raise the defence. If there had been, I should have made any amendment necessary, but, in fact, we are of opinion that none was required.

A rule was accordingly obtained by Sir George Honyman, against which cause was shown in the last term and in the sittings after it before my Brothers Mellor, Lush, Hannen, and myself. During the interval between the obtaining of the rule and the showing cause, the case of *Godard v. Gray*, L. R. 6 Q. B. 139, on which we have just given judgment, was argued before my Brothers Mellor, Hannen, and myself, and we had consequently occasion to consider the whole subject of the law of England as to enforcing foreign judgments.

My Brother Lush, who was not a party to the discussions in *Godard v. Gray*, L. R. 6 Q. B. 139, 147, has, since the argument in the present case, perused the judgment prepared by the majority in *Godard v. Gray*, and approves of it; and, after hearing the argument in the present case, we are all of opinion that the rule should be made absolute.

It is unnecessary to repeat again what we have already said in *Godard v. Gray*.

We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell v. Smyth*, 9 M. & W. 819, and again repeated by him in *Williams v. Jones*, 13 M. & W. 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 18 & 19, conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consid-

eration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed. And we think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down.

Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgment being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners.

Again, it was argued before us that foreign judgments obtained by default, where the citation was (as in the present case) by an artificial mode prescribed by the laws of the country in which the judgment was given, were not enforceable in this country because such a mode of citation was contrary to natural justice, and if this were so, doubtless the finding of the jury in the present case would remove that objection. But though it appears by the report of *Buchanan v. Rucker*, 1 Camp. 63, that Lord Ellenborough in the hurry of *Nisi Prius* at first used expressions to this effect, yet when the case came before him *in banco* in *Buchanan v. Rucker*, 9 East, 192, he entirely abandoned what (with all deference to so great an authority) we cannot regard as more than declamation, and rested his judgment on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction. "Can," he said, "the Island of Tobago pass a law to bind the rights of the whole world?"

The question we have now to answer is, Can the empire of France pass a law to bind the whole world? We admit, with perfect candor, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a court of the United States, the question for the court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No, but every country can pass laws to bind a great many persons; and therefore the further question has to be de-

terminated, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce.

Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of those suppositions is negatived in the present case.

Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.

In the case of *General Steam Navigation Company v. Guillou*, 11 M. & W. 877, 894, on a demurrer to a plea, Parke, B., in delivering the considered judgment of the Court of Exchequer, then consisting of Lord Abinger, C.B., Parke, Alderson, and Gurney, BB., thus expresses himself: "The substance of the plea is that the cause of action has been already adjudicated upon, in a competent court, against the plaintiffs, and that the decision is binding upon them, and that they ought not to be permitted again to litigate the same question. Such a plea ought to have had a proper commencement and conclusion. It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance; but it is not to be understood that we feel much doubt on that question. They do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance or temporary presence by the decision of a French court, and they did not select the tribunal and sue as plaintiffs, in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey."

It will be seen from this that those very learned judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment, merely by appearing to defend themselves against it. On the other hand, in *Simpson v. Fogo*, 1 John. & H. 18, 29 L. J. (Ch.) 657, 1 Hem. & M. 195, 32 L. J. (Ch.) 249, where the mortgagees of an English ship had come into the courts of

Louisiana, to endeavor to prevent the sale of their ship seized under an execution against the mortgagors, and the courts of Louisiana decided against them, the Vice-Chancellor and the very learned counsel who argued in the case seem all to have taken it for granted that the decision of the court in Louisiana would have bound the mortgagees had it not been in contemptuous disregard of English law. The case of *General Steam Navigation Company v. Guillou*, 11 M. & W. 877, was not referred to, and therefore cannot be considered as dissented from; but it seems clear that they did not agree in the latter part of the opinion there expressed.

We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Brissac v. Rathbone*, 6 H. & N. 301, 30 L. J. (Ex.) 238, is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favor he is bound.

In *Douglas v. Forrest*, 4 Bing. 703, the court, deciding in favor of the party suing on a Scotch judgment, say: "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." Those circumstances are all negatived here. We should, however, point out that, whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas v. Forrest*, we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France. As to this, see *London and North Western Railway Company v. Lindsay*, 3 Macq. 99.

We think, and this is all that we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal.

We think, therefore, that the rule must be made absolute.

*Rule absolute.*<sup>1</sup>

<sup>1</sup> *Acc. McEwen v. Zimmer*, 38 Mich. 765; *Scott v. Noble*, 72 Pa. 115; *Tillinghast v. Boston, &c., Co.*, 39 S. C. 484, 18 S. E. 120. See *Comber v. Leyland*, [1898] A. C. 524. — ED.

## SIRDAR GURDYAL SINGH v. THE RAJAH OF FARIDKOTE.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1894.

[Reported [1894] *Appeal Cases*, 670.]

THE judgment of their lordships was delivered by the

EARL OF SELBORNE. The respondent, the Rajah of Faridkote, obtained in the civil court of that native state, in 1879 and 1880, two *ex parte* judgments, in two suits instituted by him against the appellant, for sums amounting together to Rs. 76,474 11*a*. 3*p*., and costs. For all the purposes of the question to be now decided, those two suits may be treated as one; the appeals to Her Majesty in council having been consolidated. Two actions, founded on these judgments, were brought by the rajah against the appellant in the court of the assistant commissioner of Lahore, and were dismissed by that court, on the ground that the judgments were pronounced by the Faridkote court, without jurisdiction as against the appellant. On appeal to the additional commissioner of Lahore, the judgments of the first court were upheld. The rajah then appealed to the chief court of the Punjab, which differed from both those tribunals, and upheld the jurisdiction of the Faridkote court.

Faridkote is a native state, the rajah of which has been recognized by Her Majesty as having an independent civil, criminal, and fiscal jurisdiction. The judgments of its courts are, and ought to be, regarded in Her Majesty's courts of British India as foreign judgments. The additional commissioner of Lahore thought that no action could be brought in Her Majesty's courts upon a judgment of a native state; but in this opinion their lordships do not concur.

The appellant was for five years, beginning in 1869, in the service of the late Rajah of Faridkote as his treasurer; and the causes of action, on which the suits in the Faridkote court were brought, arose within that state, and out of that employment of the appellant by the late rajah. The claim made in each of the suits was merely personal, for money alleged to be due, or recoverable in the nature of damages, from the appellant. It is immaterial, in their lordships' view, to the question of jurisdiction (which is the only question to be now decided) whether the case, as stated, ought to be regarded as one of contract or of tort.

The appellant left the late rajah's service, and ceased to reside within his territorial jurisdiction, in 1874. He was from that time generally resident in another independent native state, that of Jhind, of which he was a native subject and in which he was domiciled; and he never returned to Faridkote after he left it in 1874. He was in Jhind when he was served with certain processes of the Faridkote court, as to which it is unnecessary for their lordships to determine what the effect would have been if there had been jurisdiction. He disregarded them, and never appeared in either of the suits instituted by the rajah, or other-



wise submitted himself to that jurisdiction. He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that court had lawful jurisdiction over him.

Under these circumstances there was, in their lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the court to which the defendant is subject at the time of suit (*actor sequitur forum rei*), which is rightly stated by Sir Robert Phillimore (International Law, vol. iv., s. 891) to "lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and *extra territorium jus dicenti, impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (*e. g.*, under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign court ought to recognize against foreigners, who owe no allegiance or obedience to the power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.

These are doctrines laid down by all the leading authorities on international law; among others, by Story (Conflict of Laws, 2d ed., sects. 546, 549, 553, 554, 556, 586), and by Chancellor Kent (Commentaries, vol. i., p. 284, note c, 10th ed.), and no exception is made to them, in favor of the exercise of jurisdiction against a defendant not otherwise subject to it, by the courts of the country in which the cause of action arose, or (in cases of contract) by the courts of the *locus solutionis*. In those cases, as well as all others, when the action is personal, the courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

The conclusion of the learned judges in the chief court of the Punjab is expressed in the following sentence of the judgment delivered by Sir Meredyth Plowden in the first of the two actions:—

"On the whole, I think it may be said, that a State assuming to exercise jurisdiction over an absent foreigner, in respect of an obligation arising out of a contract made by the foreigner while resident in the

state and to be fulfilled there, is not acting in contravention of the general practice or the principles of international law, so that its judgment should not be binding merely on the ground of the absence of the defendant."

If this doctrine were accepted, its operation, in the enlargement of territorial jurisdiction, would be very important. No authority, of any relevancy, was cited at their lordships' bar to support it, except *Becquet v. Macarthy*, 2 B. & Ad. 951, and a passage from the judgment delivered by Blackburn, J., in *Schibsby v. Westenholz*.

Of *Becquet v. Macarthy*, it was said by great authority in *Don v. Lippman*, 5 Cl. & F. 1, that it "had been supposed to go to the verge of the law;" and it was explained (as their lordships think, correctly) on the ground that "the defendant held a public office in the very colony in which he was originally sued." He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a colonial government, it would, in their lordships' opinion, have been wrongly decided; and it is evident that Fry, L.J., in *Rousillon v. Rousillon*, 14 Ch. D. 351, took that view.

The words of Blackburn, J.'s, judgment, in *Schibsby v. Westenholz*, which were relied upon, are these:—

"If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued."

Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the court; and, if this was what Blackburn, J., meant, their lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon

the question itself, which was determined in *Schibsby v. Westenholz*, Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the forum *loci contractus*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their lordships do) to the conclusion, that such obligation, unless expressed, could not be implied.

Their lordships will therefore humbly advise Her Majesty to reverse the decrees of the chief court of the Punjaub, and to restore those of the additional commissioner of Lahore. The respondent will pay the costs of the appeals to the courts below and of these appeals.

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### HENDERSON v. STANIFORD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1870.

[*Reported 105 Massachusetts, 504.*]

CONTRACT on a promissory note dated October 20, 1864, made by the defendant payable in one month to the order of the plaintiff, who was described in the writ (which was dated January 20, 1869), as of Crescent City in the county of Del Norte and State of California. The answer put the plaintiff to his proof concerning the making of the note, and set up "that if the plaintiff shall show that the defendant made the note, then the defendant answers that there is a judgment upon said note in the county of Del Norte and State of California, against the defendant and in favor of the plaintiff, and the same has never been reversed, reviewed, or annulled, but is still in force against the defendant in said State, where said contract was made, and where said defendant for a long time, to wit, from the year 1849 until some time in the year 1867, had his residence, — that he came to the State of Massachusetts some time in the year 1867, but with the intention in a short time of returning to the State of California."

The parties stated the case, referring to the pleadings, admitting the making of the note by the defendant, and continuing as follows: "In the year 1849 the defendant went from Massachusetts to California, and voted and was taxed there until he returned to Massachusetts in the year 1867. When he came to Massachusetts it was his intention to return to California, but in consequence of domestic affliction he has remained here. While in California he had his residence in the township of Crescent, otherwise known as Crescent City. In June, 1868, the plaintiff commenced an action before a justice's court, against

this defendant, in Crescent township and county of Del Norte, where said defendant had resided, upon the note in this suit, notice of the pendency of said action being duly given by publication; and the same was prosecuted to final judgment upon default, the defendant not appearing personally or by counsel. Said judgment has never been arrested, reversed, reviewed, or annulled, but is now a valid and unsatisfied judgment in full force in the State of California. Upon the above facts it is agreed that the court may render such judgment as is warranted by the pleadings." The superior court gave judgment for the defendant, and the plaintiff appealed.

WELLS, J. The defendant was not in California when the action was commenced against him there; nor at any time during its pendency. No service of process or notice was ever made upon him personally. He did not appear by counsel, or otherwise, nor assent to the judgment, which was rendered upon his default of appearance. But he had been, for a long time before that, a citizen of California; the contract was made there; and that continued to be his legal domicile when the judgment was rendered. He was, therefore, upon principles of international right, subject to the laws, and to the jurisdiction of the courts of that State. Story Conf. Laws, §§ 546, 548; Hall v. Williams, 6 Pick. 232, 240; Gillespie v. Commercial Insurance Co., 12 Gray, 201. In Massachusetts, jurisdiction is assumed to be exercised in suits against parties who have been inhabitants of the State, although not so at the time of action brought. Gen. Sts. c. 126, § 1; Morrison v. Underwood, 5 Cush. 52; Orcutt v. Ranney, 10 Cush. 183. We must presume that the exercise of jurisdiction, in the suit in question, was in accordance with the laws of California. The agreed facts state that the judgment "is now a valid and unsatisfied judgment, in full force in the State of California."<sup>1</sup>

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### DARRAH v. WATSON.

SUPREME COURT OF IOWA. 1873.

[Reported 36 Iowa, 116.]

MILLER, J.<sup>2</sup> The judgment record, on which this action is brought, shows that the action was commenced in the county court of Monongalia County, Virginia (now West Virginia), by the issuance of a summons, returnable on the first Monday of June, 1859. The sheriff's return on the summons shows a personal service thereof on the 6th day of June, 1859. . . .

<sup>1</sup> The remainder of the opinion, in which the effect of the judgment is discussed, is here omitted.

*Acc.* Hunt v. Hunt, 72 N. Y. 217; Frothingham v. Barnes, 9 R. I. 474 (*semble*).—ED.

<sup>2</sup> Part of the opinion is omitted.—ED.

On the trial the defendant Watson was sworn as a witness, and testified that during the year 1859, he resided in Greene County, Pennsylvania, and had so resided there for about three or four years prior to June, 1859, and never afterward resided in the State of Virginia; that during the month of June, 1859, he went from his residence in Pennsylvania into Monongalia County, Virginia, temporarily and on business; was there only two or three hours and returned again to Greene County, Pennsylvania, which latter county adjoins Monongalia County, Virginia; that while thus in the latter county he was served with some kind of paper or process, which was the only paper or process ever served on him in said county; that he paid no attention to the matter, never appeared in the action, made no defence and authorized no one to appear for him. Whereupon defendant's counsel asked the court to instruct the jury in substance, that if they found that the defendant, at the time of the rendition of the judgment in Virginia, was not a resident of or domiciled in said State, but was a resident of and domiciled in the State of Pennsylvania; that defendant, when the summons or original process was served upon him, was in the State of Virginia only for a few hours temporarily and on business; that defendant never afterward resided in said State; that defendant did not appear to the action or authorize any one to appear for him, then the county court of Monongalia County, Virginia, did not, by virtue of such service or by any proceedings in said action, acquire jurisdiction of the person of defendant to render a personal judgment as would be binding against him in this State.

This instruction was refused, and this ruling is assigned as error.

We have before said that the insufficiency of the service of the summons would not have the effect to render the judgment void as for want of jurisdiction. But it is insisted by appellant's counsel that "even admitting that the summons had been served in time and personally on defendant in Virginia," the court did not acquire jurisdiction of the defendant who was a resident of another State, and never afterward was a resident of Virginia, but was merely temporarily therein when he was served with original process in the action. The position assumed by counsel is, that the courts of Virginia could not acquire jurisdiction of the person of a citizen and resident of Pennsylvania by the service of original process upon him while temporarily in the former State on business.

The doctrine is well settled that no State can by its judgments rendered in its courts bind personally a defendant who is not within its jurisdiction, and on whom no notice has been served. *Melhop & Kingman v. Doane & Co.*, 31 Iowa, 397, and cases cited. And that to entitle a judgment rendered in one State to the full faith and credit mentioned in the Constitution and laws of the United States the court must have had jurisdiction not only of the subject-matter, but of the person of the defendant. *Ibid.* But is it true that the courts of one State cannot acquire jurisdiction of the person of a citizen and resi-

dent of a sister State by the service of original process upon such citizen within the jurisdiction of the former State? We think it is not. In the only case cited by appellant's counsel, *Bissell v. Briggs*, 9 Mass. 462, Chief Justice Parsons, on page 470, says: "Now, an inhabitant of one State may, without changing his domicile, go into another; he may there contract a debt or commit a tort, and while there he owes a temporary allegiance to that State, is bound by its laws, and is amenable to its courts." We have found no case holding a contrary doctrine to this.

Applying this doctrine to the case before us, we hold that the county court of Virginia did acquire jurisdiction of the person of the defendant by the service of the summons upon him while temporarily within its local jurisdiction, and that its judgment is entitled to the same faith and credit in this State as it was entitled by the laws of the State where rendered. The court below did not err, therefore, in refusing the instruction asked, and its judgment is *Affirmed*.<sup>1</sup>

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### ST. CLAIR v. COX.

SUPREME COURT OF THE UNITED STATES. 1882.

[Reported 106 *United States*, 350.]

FIELD, J. This action was brought by the plaintiff in the court below, to recover the amount due on two promissory notes of the defendants, each for the sum of \$2,500, bearing date on the 2d of August, 1877, and payable five months after date, to the order of the Winthrop Mining Company, at the German National Bank, in Chicago, with interest at the rate of seven per cent per annum.

To the action the defendants set up various defences, and, among others, substantially these: That the consideration of the notes had failed; that they were given, with two others of like tenor and amount, to the Winthrop Mining Company, a corporation created under the laws of Illinois, in part payment for ore and other property sold to the defendants upon a representation as to its quantity, which proved to be incorrect; that only a portion of the quantity sold was ever delivered, and that the value of the deficiency exceeded the amount of the notes in suit; that at the commencement of the action, and before the transfer of the notes to the plaintiff, the Winthrop Mining Company was indebted to the defendants in a large sum, viz. \$10,000, upon a judgment recovered by them in the Circuit Court of Marquette County, in the State of Michigan, and that the notes were transferred to him after their maturity and dishonor, and after he had notice of the defences to them.

<sup>1</sup> *Acc. Alley v. Caspari*, 80 Me. 234, 14 Atl. 12; *Thompson v. Cowell*, 148 Mass. 552. — Ed.

On the trial, evidence was given by the defendants tending to show that the plaintiff was not a *bona fide* holder of the notes for value. A certified copy of that judgment was also produced by them and offered in evidence; but on his objection that it had not been shown that the court had obtained jurisdiction of the parties, it was excluded, and to the exclusion an exception was taken. The jury found for him for the full amount claimed; and judgment having been entered thereon, the defendants brought the case here for review. The ruling of the court below in excluding the record constitutes the only error assigned.

The judgment of the Circuit Court in Michigan was rendered in an action commenced by attachment. If the plaintiffs in that action were, at its commencement, residents of the State, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached, cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability beyond the amount which the proceeds of the property discharged. There was no appearance of the company in the action, and judgment against it was rendered for \$6,450 by default. The officer, to whom the writ of attachment was issued, returned that, by virtue of it, he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county."

The laws of Michigan provide for attaching property of absconding, fraudulent, and non-resident debtors and of foreign corporations. They require that the writ issued to the sheriff, or other officer by whom it is to be served, shall direct him to attach the property of the defendant, and to summon him if he be found within the county, and also to serve on him a copy of the attachment and of the inventory of the property attached. They also declare that where a copy of the writ of attachment has been personally served on the defendant, the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons. 2 Comp. Laws, 1871, sects. 6397 and 6413.

They also provide, in the chapter regulating proceedings by and against corporations, that "suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a

corporation, may be served on the presiding officer, the cashier, the secretary, or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct;" and that "in suits commenced by attachment in favor of a resident of this State against any corporation created by or under the laws of any other State, government, or country, if a copy of such attachment and of the inventory of property attached shall have been personally served on any officer, member, clerk, or agent of such corporation within this State, the same proceedings shall be thereupon had, and with like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant." 2 Comp. Laws, 1871, sects. 6544 and 6550.

The courts of the United States only regard judgments of the State courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In *Pennoyer v. Neff* we had occasion to consider at length the manner in which State courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in the Federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a State to determine the status of one of its citizens towards a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S. 714.

The doctrine of that case applies, in all its force, to personal judgments of State courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the State where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the State will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the State is passed difficulties arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it.

Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the



State by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his State, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

In *McQueen v. Middleton Manufacturing Co.*, decided in 1819, the Supreme Court of New York, in considering the question whether the law of that State authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the State, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that if the president of a bank went to New York from another State he would not represent the corporation there; and that "his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." 16 Johns. (N. Y.) 5. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but nevertheless it has been accepted as correctly stating the law. It was cited with approval by the Supreme Court of Massachusetts, in 1834, in *Peckham v. North Parish in Haverhill*, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the Commonwealth. 16 Pick. (Mass.) 274. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with suggestions that the doctrine might be otherwise if the foreign corporation sent its officer to reside in the State and transact business there on its account. *Libbey v. Hodgdon*, 9 N. H. 394; *Moulin v. Trenton Insurance Co.*, 24 N. J. L. 222.

This doctrine of the exemption of a corporation from suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States. To meet and obviate this inconvenience and injustice, the legislatures of several States interposed, and provided for service of process on officers and agents of

foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the States for which they are respectively appointed when it is called to legal responsibility for their transactions.

The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other States, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the State where it was created.

A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in *Lafayette Insurance Co. v. French*: "These conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." 18 How. 404, 407; *Paul v. Virginia*, 8 Wall. 168.

The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a

condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, enroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in *Lafayette Insurance Co. v. French*, to which we have already referred, sustains these views.<sup>1</sup>

The State of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the State. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on "any officer, member, clerk, or agent of such corporation" within the State, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that State is made to serve a double purpose, — as a command to the officer to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the State, and the agent be appointed to act there. We so construe the words "agent of such corporation within this State." They do not sanction service upon an officer or agent of the corporation who resides in another State, and is only casually in the State, and not charged with any business of the corporation there. The decision in *Newell v. Great Western Railway Co.*, reported in the 19th of Michigan Reports, supports this view, although that was the case of an attempted service of a declaration as the commencement of the suit. The defendant was a Canadian corporation owning and operating a railroad from Suspension Bridge in Canada to the Detroit line at Windsor opposite Detroit, and carrying passengers in connection with the Michigan Central Railroad Company, upon tickets sold by such companies respectively. The suit was commenced in Michigan, the declaration alleging a contract by the defendant to carry the plaintiff over its road, and its violation of the

<sup>1</sup> *Acc. Compagnie Générale Transatlantique v. Law*, [1899] A. C. 431; *Fireman's Ins. Co. v. Thompson*, 155 Ill. 204, 40 N. E. 488; *Reyer v. Odd Fellows' Acc. Assoc.*, 157 Mass. 367. — Ed.

contract by removing him from its cars at an intermediate station. The declaration was served upon Joseph Price, the treasurer of the corporation, who was only casually in the State. The corporation appeared specially to object to the jurisdiction of the court, and pleaded that it was a foreign corporation, and had no place of business or agent or officer in the State, or attorney to receive service of legal process, or to appear for it; and that Joseph Price was not in the State at the time of service on him on any official business of the corporation. The plaintiff having demurred to this plea, the court held the service insufficient. "The corporate entity," said the court, "could by no possibility enter the State, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of an officer or agent. To involve the representation of the company here, the supposed representative would have to hold or enjoy in this State an actual present official or representative status. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative character at the frontier, if he should bring that character no further than the territorial boundary of the government to whose laws the corporate body itself, and consequently the official positions of its officers also, would be constantly indebted for existence, it could not, with propriety, be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so when the treasurer, the then official, the officer then in a manner impersonating the company, should be served. Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining the business or act of any besides himself. He had no principal, and he was not an agent. He had no official status or representative character in this State." 19 Mich. 344.

According to the view thus expressed by the Supreme Court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the State. This representation implies that the corporation does business, or has business, in the State for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the State, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former State, the Supreme Court of New Jersey said, that a law of another

State which sanctioned such service upon an officer accidentally within its jurisdiction was "so contrary to natural justice and to the principles of international law, that the courts of other States ought not to sanction it." *Moulin v. Trenton Insurance Co.*, 24 N. J. L. 222, 234.

Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute — a member, for instance, of the foreign corporation, that is, a mere stockholder — is not a departure from the principle of natural justice mentioned in *Lafayette Insurance Co. v. French*, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record — either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court — that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the State when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the State court, gave no information on the subject. It did not, therefore, appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

*Judgment affirmed.*

## COPIN v. ADAMSON.

EXCHEQUER. 1874.

[*Reported Law Reports*, 9 *Exchequer*, 345.]

DECLARATION by the assignee in bankruptcy of the Société de Commerce de France, Limited, on a judgment for £151 15s. recovered on the 7th of February, 1867, in the empire of France, by him against the defendant in the Court of the Tribunal of Commerce of the Department of the Seine, being a court duly holden, and having jurisdiction in that behalf.

Plea. 3. That the suit was commenced, according to the French law, by process and summons, and that the defendant was not at any time previous to the recovery of judgment resident or domiciled within the jurisdiction of the said court, nor is he a native of France, and he was not served with any process or summons, nor did he appear, nor had he any notice or knowledge of any process or summons, or any opportunity of defending himself.

Replications. 1. That defendant was shareholder in a French company, the articles of which provided that every shareholder must elect some domicile in Paris, or in default thereof would be taken to be domiciled at the office of an imperial procurator, for the purpose of service of process in all disputes arising out of the liquidation of the company between the shareholders and the company; and that such disputes should be submitted to the proper French court. That service was made accordingly, as provided by French law.

2. That the law of France contained similar provisions.<sup>1</sup>

AMPHLETT, B. An important question is raised on these replications, involving the liability of a British subject to be sued in the courts of a foreign country. As to the first replication demurred to, the court is unanimously of opinion that the defendant is shown upon the face of it to have contracted with the company, of which he is a shareholder, and whose representative the plaintiff is, that he would, under the circumstances disclosed, be amenable to the jurisdiction of the Court of the Tribunal of Commerce of the Department of the Seine. But as to the second replication, my brother Pigott and myself think that although the allegations are sufficient to show that the defendant's contract is to be governed by French law, still that they do not show that he is subject to the jurisdiction of the French court. The contract must be interpreted by an English tribunal.

Now, the plaintiff seems to have thought that all he need allege is that French law is to govern the contract. But it by no means follows that the defendant has subjected himself to a foreign jurisdiction. The cases which have been referred to show that before an Englishman can be made amenable to a foreign court, he must bear either

<sup>1</sup> The replications, stated at length by the reporter, are here abridged. — Ed.

an absolute or a qualified or temporary allegiance to the country in which the court is. He must, as is pointed out by Blackburn, J., in *Schibsby v. Westenholz*, Law Rep. 6 Q. B. 155, p. 161, be a subject of the country, or as a resident there when the action was commenced (or perhaps it would be enough if he were there when the obligation was contracted, though upon this point doubt is expressed), so as to be under the protection of or amenable to its laws. The learned judge also puts two other cases in which a person might be bound, — one where he, as plaintiff, has selected his tribunal, and the other where he has voluntarily appeared before it and takes the chance of a judgment in his favor. The defendant's liability in the latter case, however, is left an open question. But independently of that question, I apprehend that a man may contract with others that his rights shall be determined not only by foreign law, but by a foreign tribunal, and thus, by reason of his contract, and not of any allegiance absolute or qualified, would become bound by that tribunal's decision. It is upon this ground that I decide the demurrer to the first replication in the plaintiff's favor. I think that the defendant must be taken to have agreed that if he did not elect a domicile one should be elected for him; for the articles of association provide for its being done. It is said that it is not sufficiently stated that he had notice of this particular provision; but I think it must be implied that he had notice, from the fact of his becoming a shareholder in the company.

I now proceed to consider the second replication, which is silent as to the statutes or articles of association, but simply alleges that according to French law the members of the company were bound to elect a domicile; and that, according to French law, upon default a domicile would be elected for them at a public office, where process might be served, and that they would be bound thereby. I confess I cannot find a case which has gone so far as to hold a defendant liable, under such circumstances, upon a foreign judgment obtained, as this was, without any knowledge on his part of the proceedings. Can it be said that an Englishman, for example, who buys a share in a foreign company on the London Stock Exchange, thereby becomes necessarily bound by any decision to which the foreign tribunal may come upon a matter affecting his interests? Suppose there had been a provision by the law of France that whenever a member neglected to elect a domicile he should pay double calls, are we to enforce his liability in an action on a judgment for such calls obtained against him without his knowledge in the foreign court? No doubt in the present case, where the law of France is in question, the probability is that the shareholder would not be subjected to any extraordinary or unjust liabilities. But if the principle of law is that which the plaintiff contends for, it must be applied in cases of countries where the law might be very much more open to objection than it is likely to be in a country such as France.

It is said, however, that the authorities upon the point are decisive.

and two were especially relied on. The first was the *Bank of Australasia v. Harding*, 9 C. B. 661, 19 L. J. (C. P.) 345; and it is, I agree, a strong authority in support of the first replication, but not of the second. In that case there had been a local act obtained giving power to the company's creditors to obtain judgment against a representative of all the members, and enacting that by that judgment all the members should be bound; and it was upon the circumstance that the act existed that the judgment of the court was founded; and nothing falls from any of the judges to indicate that they would have held the defendant bound if there had been no such act. In their opinion the defendant was to be considered as a consenting party to the passing of the act, or as one of the parties at whose request it was passed, and therefore bound by its provisions. See per Wilde, C. J., and Cresswell, J., pp. 685, 687. In the absence of such consent, it seems to me that the court would have come to a contrary conclusion.

The second case relied on was *Vallée v. Dumergue*, 4 Ex. 290, 18 L. J. (Ex.) 398; but here, again, although the decision supports the first, it fails to support the second replication. There the defendant had become by transfer the owner of shares in a French company; and upon accepting the shares was bound, according to French law, to elect a domicile. He actually did so, and gave notice of his election to the company. He was, therefore, aware of what the French law was, and had complied with it. Then, having left the country, notice of process was, as here, left at the elected domicile, but never reached the defendant against whom judgment by default was recovered. It was held he was liable on the judgment, but upon the ground that he had done something more than become a shareholder in the company; he had so conducted himself as to warrant the inference that he had agreed to be bound by the decision of the foreign court. "The replication consists," says Alderson, B. (p. 303) "of a statement of facts which show that by the agreement to which the defendant has become a party, no actual notice need be given to him;" and, again (p. 303), "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode has been followed, even though he may not have had actual notice of them."

For these reasons my judgment (in which my brother Pigott concurs) is for the plaintiff upon the demurrer to the first replication, and for the defendant upon the demurrer to the second.

*Judgment accordingly.*<sup>1</sup>

KELLY, C. B.<sup>2</sup> [dissenting on the second replication.] I apprehend that it is now established by the law of this country that one who becomes a shareholder in a foreign company, and therefore and thereby

<sup>1</sup> *Acc.* *Bank of Australasia v. Harding*, 9 C. B. 661; *Bank of Australasia v. Nias*, 16 Q. B. 717. — ED.

<sup>2</sup> Part of this opinion is omitted. — ED.



a member of that company, — such company existing in a foreign country, and subject in all things to the law of that country, — himself becomes subject to the law of that country, and to the articles or constitutions of that company construed and interpreted according to the law of that country in all things, and as to all matters and all questions existing or arising in relation to or connected with the acts and affairs and the rights and liabilities of such company and its members severally and collectively; and if that company, by the law of the country in which it exists, or by the articles of its constitution, is subject to the jurisdiction of a particular court within that country, so also is each shareholder or member subject to its jurisdiction in all cases in relation to or connected with such company.

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EX PARTE BLAIN.

COURT OF APPEAL. 1879.

[*Reported 12 Chancery Division, 522.*]

THIS was an appeal from a decision of Mr. Register Pepys, acting as Chief Judge in Bankruptcy.

James Sawers, of Liverpool, and six other persons, traded at Liverpool and in London under the firm of James Sawers & Co., and at Valparaíso and other places in South America under the firm of Sawers, Woodgate, & Co. The principal place of business of the firm in England was at Liverpool. Two of the partners were Chilean subjects, domiciled and permanently resident in Chili, and they had never been in England or in any part of Great Britain.

On the 16th of December, 1878, William Blain commenced an action in the Queen's Bench Division against the firm of James Sawers & Co., in respect of a debt of £2,500 contracted by the firm in England. The writ was served the same day on James Sawers personally, at the place of business of the firm in Liverpool. It was not served on any of the other partners. On the 24th of January, 1879, the defendants not having appeared to the writ, judgment for £2,500 and costs was entered for the plaintiff against the defendant firm. A writ of *fi. fa.* was issued upon the judgment, under which the sheriff seized goods of the firm at Liverpool and sold them on the 29th of January, 1879. On the same day the plaintiff presented a bankruptcy petition in the London court against all the members of the firm of James Sawers & Co., alleging that the levy of the execution by seizure and sale was an act of bankruptcy committed by them. An *ex parte* order was made, under rule 66 of the Bankruptcy Rules, 1870, giving the petitioning creditor leave to serve the petition on the two Chilean partners in Chili. Before the hearing of the petition as against them they appeared under protest, not submit-

ting to the jurisdiction of the court, and asked that the order for service might be discharged, on the ground that the court had no jurisdiction over them. The registrar discharged the order. The petitioning creditor appealed.

JAMES, L. J.<sup>1</sup> It appears to me that the registrar's order was perfectly right. The respondents come here under protest, as they have a perfect right to do, to discharge an order which was made in this country, by a court of this country, on the ground that it is an order which improperly emanated, and they ask to have the order discharged, so that they may never be embarrassed, or be liable to be embarrassed, by the fact of such an order having been issued.

It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners, who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction. Every foreigner who comes into this country, for however limited a time, is, during his residence here within the allegiance of the sovereign, entitled to the protection of the sovereign and subject to all the laws of the sovereign. But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation. English legislation has said that, if a debtor allows his goods to be taken in execution, certain consequences shall follow, and English legislation has a right to say that with regard to an English subject. But what right has it to say so with regard to a Chilean? No doubt it has a right to say to a Chilean, or to any other foreigner, "If you make a contract in England, or commit a breach of a contract in England, under a particular act of Parliament a particular procedure may be taken by which we can effectually try the question of that contract, or that breach, and give execution against any property of yours in this country." But that is because the property is within the protection and subject to the powers of the English law. To what extent the decision of such a question would be recognized abroad remains to be considered, and must be determined by the tribunals abroad. If a foreigner, being served with a writ under the provisions of the Judicature Act, did not choose to appear, and the legislature said, "If you do not appear you will commit a default in that way, and we will give judgment against you," whether that judgment would, under such circumstances, be recognized by foreign tribunals, as being consistent with international law and the general

<sup>1</sup> Arguments of counsel and the concurring opinions of BRETT and COTTON, L.JJ., are omitted. — Ed.

principles of justice, is a matter which must be determined by them. But we have to consider a matter, not of British, but of peculiarly English legislation, because the Bankruptcy Act is confined to England, and does not extend to Scotland or Ireland, except in certain cases expressly provided for, and I believe it does not extend to the colonies. And we have to deal with the case of a Chilian who says, "I am a Chilian, and I wish to be a Chilian; I have never made myself subject to English legislation or English tribunals. I do not wish to come here to be made a bankrupt." It seems to me he has a right to say that. As I happen to know, there is in the Sandwich Islands a code of bankruptcy, which was introduced by Kamehameha II., and I think it would be monstrous if an English merchant of Liverpool, having business transactions in the Sandwich Islands, was summoned by the court there to appear in a bankruptcy proceeding at Honolulu. It is not consistent with ordinary principles of justice or the comity of nations that the legislature of one country should call on the subject of another country to appear before its tribunals when he has never been within their jurisdiction. Of course, if a foreigner has come into this country and has committed an act of bankruptcy here, he is liable to the consequences of what he has done here; but, in the absence of express legislative provision, compelling me to say that the legislature has done that which, in my opinion, would be a violation of international law, I respectfully decline to hold that it has done anything of the kind.

I therefore entirely agree with the decision of the registrar, that the order for service ought to be discharged. The other ground on which he put his decision would, I think, be sufficient, namely, that the whole of the provisions of the Bankruptcy Act with regard to acts of bankruptcy proceed on the commission of some act or default by the debtor. Sect. 6 begins with saying that the following "acts or defaults" are to be included under the expression "acts of bankruptcy," and the registrar was of opinion that it would be impossible to say that these Chilian subjects had been guilty of any default. I do not at all differ from him in that conclusion.<sup>1</sup>

<sup>1</sup> *Acc. In re Pearson*, [1892] 2 Q. B. 263; *In re A. B. & Co.*, [1900] 1 Q. B. 541. In the latter case LINDLEY, M. R., said: "Bankruptcy is a very serious matter. It alters the status of the bankrupt. This cannot be overlooked or forgotten when we are dealing with foreigners, who are not subject to our jurisdiction. What authority or right has the court to alter in this way the status of foreigners, who are not subject to our jurisdiction? If Parliament had conferred this power in express words, then of course the court would be bound to exercise it. But the decisions go to this extent, and rightly, I think, in principle, that unless Parliament has conferred upon the court that power in language which is unmistakable, the court is not to assume that Parliament intended to do that which might so seriously affect foreigners who are not resident here, and might give offence to foreign governments." — Ed.

GROVER AND BAKER SEWING MACHINE CO. *v.*  
RADCLIFFE.

SUPREME COURT OF THE UNITED STATES. 1890.

[*Reported 137 United States, 287.*]

Error to the Court of Appeals of the State of Maryland.

This was an action brought in the Circuit Court of Cecil County, Maryland, by the Grover and Baker Sewing Machine Company against James and John Bengé, citizens of Delaware, by summons and attachment served on William P. Radcliffe as garnishee. The suit was upon a judgment for the sum of three thousand dollars, entered by the prothonotary of the Court of Common Pleas in and for the county of Chester, Pennsylvania, against James and John Bengé (who were not citizens or residents of Pennsylvania and were not served with process) upon a bond signed by them, giving authority to "any attorney of any court of record in the State of New York or any other State" to confess judgment against them for the amount of the bond. The law of Pennsylvania authorized the prothonotary of any court to enter judgment upon such a bond.<sup>1</sup>

FULLER, C. J. The Maryland Circuit Court arrived at its conclusion upon the ground that the statute of Pennsylvania relied on did not authorize the prothonotary of the Court of Common Pleas of that State to enter the judgment; and the Court of Appeals of Maryland reached the same result upon the ground that the judgment was void as against John Bengé, because the court rendering it had acquired no jurisdiction over his person.

It is settled that notwithstanding the provision of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," Art. IV., section I, and the acts of Congress passed in pursuance thereof, 1 Stat. 22, Rev. Stat. § 905 — and notwithstanding the averments in the record of the judgment itself, the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding; that the jurisdiction of a foreign court over the person or the subject-matter, embraced in the judgment or decree of such court, is always open to inquiry; that, in this respect, a court of another State is to be regarded as a foreign court; and that a personal judgment is without validity if rendered by a State court in an action upon a money demand against a non-resident of the State, upon whom no personal service of process within the State was made, and who did not appear. *D'Arcy v. Ketchum*, 11 How. 165; *Thompson v. Whitman*, 18 Wall. 457; *Hall v. Lanning*, 91 U. S. 160; *Pennoyer v. Neff*, 95 U. S. 714.

<sup>1</sup> This statement is abridged from the statement of FULLER, C. J. — Ed.

The rule is not otherwise in the State of Pennsylvania, where the judgment in question was rendered; *Guthrie v. Lowry*, 84 Penn. St. 533; *Scott v. Noble*, 72 Penn. St. 115; *Noble v. Thompson Oil Co.*, 79 Penn. St. 354; *Steel v. Smith*, 7 W. & S. 447; nor in the State of Maryland, where the action under review was brought upon it; *Bank of the United States v. Merchants' Bank*, 7 Gill, 415; *Clark v. Bryan*, 16 Maryland, 171; *Weaver v. Boggs*, 38 Maryland, 255. And the distinction between the validity of a judgment rendered in one State, under its local laws upon the subject, and its validity in another State, is recognized by the highest tribunals of each of these States.

Thus in *Steel v. Smith*, 7 W. & S. 447, it was decided, in 1844, that a judgment of a court of another State does not bind the person of the defendant, in another jurisdiction, though it might do so under the laws of the State in which the action was brought, and that the act of Congress does not preclude inquiry into the jurisdiction, or the right of the State to confer it. The action was brought on a judgment rendered in Louisiana, and Mr. Chief Justice Gibson, in delivering the opinion of the court, said: "The record shows that there was service on one of the joint owners, which, in the estimation of the law of the court, is service on all; for it is affirmed in *Hill v. Bowman*, already quoted [14 La. 445], that the State of Louisiana holds all persons amenable to the process of her courts, whether citizens or aliens, and whether present or absent. It was ruled in *George v. Fitzgerald*, 12 La. 604, that a defendant, though he reside in another State, having neither domicile, interest nor agent in Louisiana, and having never been within its territorial limits, may yet be sued in its courts by the instrumentality of a curator appointed by the court to represent and defend him. All this is clear enough, as well as that there was in this instance a general appearance by attorney, and a judgment against all the defendants, which would have full faith and credit given to it in the courts of the State. But that a judgment is always regular when there has been an appearance by attorney, with or without warrant, and that it cannot be impeached collaterally, for anything but fraud or collusion, is a municipal principle, and not an international one having place in a question of State jurisdiction or sovereignty. Now, though the courts of Louisiana would enforce this judgment against the persons of the defendants, if found within reach of their process, yet, where there is an attempt to enforce it by the process of another State, it behooves the court whose assistance is invoked to look narrowly into the constitutional injunction, and give the statute to carry it out a reasonable interpretation." pp. 449, 450.

Referring to § 1307 of Mr. Justice Story's Commentaries on the Constitution, and the cases cited, to which he added *Benton v. Burog*, 10 S. & R. 240, the learned Judge inquired: "What, then, is the right of a State to exercise authority over the persons of those

who belong to another jurisdiction, and who have perhaps not been out of the boundaries of it?" (p. 450) and quoted from Vattel, Burge, and from Mr. Justice Story (Conflict of Laws, c. 14, § 539), that "'no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals,'" and thus continued: "Such is the familiar, reasonable, and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the revolution. Certainly it was not intended to legitimate an assumption of extraterritorial jurisdiction which would confound all distinctive principles of separate sovereignty; and there evidently was such an assumption in the proceedings under consideration. . . . But I would perhaps do the jurisprudence of Louisiana injustice, did I treat its cognizance of the defendants as an act of usurpation. It makes no claim to extraterritorial authority, but merely concludes the party in its own courts, and leaves the rest to the Constitution as carried out by the act of Congress. When, however, a creditor asks us to give such a judgment what is in truth an extraterritorial effect, he asks us to do what we will not, till we are compelled by a mandate of the court in the last resort." p. 451.

In *Weaver v. Boggs*, 38 Maryland, 255, it was held that suit could not be maintained in the courts of Maryland upon a judgment of a court of Pennsylvania rendered upon returns of *nilhil* to two successive writs of *scire facias* issued to revive a Pennsylvania judgment of more than twenty years' standing, where the defendant had for more than twenty years next before the issuing of the writs resided in Maryland and out of the jurisdiction of the court that rendered the judgment. The court said: "It is well settled that a judgment obtained in a court of one State cannot be enforced in the courts and against a citizen of another, unless the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered and enforced there even against the property, effects, and credits, of a non-resident defendant there situated; but it cannot be enforced or made the foundation of an action in another State. A law which substitutes constructive for actual notice is binding upon persons domiciled within the State where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits. This rule is based upon international law, and upon that natural protection which every country owes to its own citizens. It concedes the jurisdiction of the court to the extent of the State where

the judgment is rendered, but upon the principle that it would be unjust to its own citizens to give effect to the judgments of a foreign tribunal against them when they had no opportunity of being heard, its validity is denied."

Publicists concur that domicile generally determines the particular territorial jurisprudence to which every individual is subjected. As correctly said by Mr. Wharton, the nationality of our citizens is that of the United States, and by the laws of the United States they are bound in all matters in which the United States are sovereign; but in other matters, their domicile is in the particular State, and that determines the applicatory territorial jurisprudence. A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment; and it is competent for a defendant in an action on a judgment of a sister State, as in an action on a foreign judgment, to set up as a defence, want of jurisdiction, in that he was not an inhabitant of the State rendering the judgment and had not been served with process, and did not enter his appearance. Whart. Conflict Laws, §§ 32, 654, 660; Story, Conflict Laws, §§ 539, 540, 586.

John Bengé was a citizen of Maryland when he executed this obligation. The subject-matter of the suit against him in Pennsylvania was merely the determination of his personal liability, and it was necessary to the validity of the judgment, at least elsewhere, that it should appear from the record that he had been brought within the jurisdiction of the Pennsylvania court by service of process, or his voluntary appearance, or that he had in some manner authorized the proceeding. By the bond in question he authorized "any attorney of any court of record in the State of New York, or any other State, to confess judgment against him (us) for the said sum, with release of errors, etc." But the record did not show, nor is it contended, that he was served with process, or voluntarily appeared, or that judgment was confessed by an attorney of any court of record of Pennsylvania. Upon its face, then, the judgment was invalid, and to be treated as such when offered in evidence in the Maryland court.

It is said, however, that the judgment was entered against Bengé by a prothonotary, and that the prothonotary had power to do this under the statute of Pennsylvania of February 24, 1806. Laws of Penn. 1805-6, p. 347. This statute was proved as a fact upon the trial in Maryland, and may be assumed to have authorized the action taken, though under *Connay v. Halstead*, 73 Penn. St. 354, that may, perhaps, be doubtful. And it is argued that the statute, being in force at the time this instrument was executed, should be read into it and considered as forming a part of it, and therefore that John Bengé had consented that judgment might be thus entered up against him without service of process, or appearance in person, or by attorney.

But we do not think that a citizen of another State than Pennsylvania can be thus presumptively held to knowledge and acceptance of particular statutes of the latter State. What Bengé authorized was a confession of judgment by any attorney of any court of record in the State of New York or any other State, and he had a right to insist upon the letter of the authority conferred. By its terms he did not consent to be bound by the local laws of every State in the Union relating to the rendition of judgment against their own citizens without service or appearance, but on the contrary made such appearance a condition of judgment. And even if judgment could have been entered against him, not being served and not appearing, in each of the States of the Union, in accordance with the laws therein existing upon the subject, he could not be held liable upon such judgment in any other State than that in which it was so rendered, contrary to the laws and policy of such State.

The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another State to override their own.

No color to any other view is given by our decisions in *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 400, and *Hopkins v. Orr*, 124 U. S. 510, cited for plaintiff in error. Those cases involved the rendition of judgments against sureties on restitution and appeal bonds if judgment went against their principals, and the sureties signed with reference to the particular statute under which each bond was given; nor did, nor could, any such question arise therein as that presented in the case at bar.

*Judgment affirmed.*<sup>1</sup>

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### FITZSIMMONS v. JOHNSON.

SUPREME COURT OF TENNESSEE. 1891.

[*Reported 90 Tennessee, 416.*]

CALDWELL, J.<sup>2</sup> John W. Todd died, testate, at his residence in Clermont County, Ohio, in the early part of the year 1864. He nominated his friends, John Johnson and C. W. Goyer, of Memphis, Tennessee, as executors of his will. They accepted the trust, went to Ohio, and, on April 27, 1864, were duly qualified by the Probate Court of Clermont County as executors of the will.

<sup>1</sup> See *First Nat. Bank v. Cunningham*, 48 Fed. 510; *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306; *Teel v. Yost*, 128 N. Y. 387.

On consent as a ground of jurisdiction of the person, see *Wright v. Boynton*, 37 N. H. 9; *McCormick v. R. R.*, 49 N. Y. 303. — Ed.

<sup>2</sup> Only so much of the opinion as deals with the question of jurisdiction is here given. — Ed.



On November 6, 1865, the executors made what purported to be a final settlement of the estate of their testator, showing that they had received assets to the amount of \$63,495.25, and that, of this, they had paid to the widow of the testator, as sole distributee, \$61,040.10, and that the other \$2,455.15 had been used in the payment of debts and expenses of administration. This settlement was made in the Probate Court of Clermont County, Ohio, on whose record the following entry was made: "This day the court examined the accounts and vouchers of C. W. Goyer and John Johnson, executors of the estate of John W. Todd, deceased, and found the same to be in all things correct; that they have been regularly advertised for exceptions, and none having been filed thereto, the same are hereby approved and confirmed. And the court finds that said executors have paid all just claims against said estate, and have distributed the remainder according to the will of the testator. And the said accounts are ordered to be recorded, and the executors are discharged."

The testator left no children or representatives of children. By the first ten clauses of his will he expressed certain desires, which need not be mentioned in this opinion, and made provision for his widow; and by the eleventh clause he devised and bequeathed the residuum of his estate, both real and personal, to his four sisters and one brother. The provision made for the widow proved unsatisfactory to her; hence, she failed to accept it. And her non-acceptance had the same legal effect under the Ohio law that an affirmative dissent has under our law. She had the same claims upon her husband's estate as she would have had if he had died intestate.

The executors assumed that she was entitled to the whole of his personal estate after the payment of debts and expenses, and upon that assumption they paid her the \$61,040.10.

Such had been the statute law of Ohio, but it was changed, so as to allow the widow only one-third of her husband's net personal estate, a few years before the final settlement.

On January 15, 1887, Mary A. Fitzsimmons, one of the residuary legatees, filed her petition in error, in the Court of Common Pleas of Clermont County, Ohio, for the purpose of having the judgment of the Probate Court reviewed and reversed. Goyer having died in the meantime, Johnson alone, as surviving executor, was made defendant to this petition. The petition was accompanied with an affidavit that Johnson was a non-resident of the State of Ohio, and could not, therefore, be personally served with summons, that he had no attorney of record in the State, and that it was a proper case for publication. Thereupon publication was made for Johnson, as a non-resident, requiring him to appear and plead to the petition; and a copy of a newspaper containing the published notice was sent to him at his residence in Memphis, Tennessee.

Johnson made default, and on January 20, 1888, the petition in error was heard in the Court of Common Pleas, and the judgment of

the Probate Court was reversed and set aside, and the cause was remanded to the Probate Court for further proceedings. After the remand, Mrs. Fitzsimmons and Mrs. Young, another of the residuary legatees, appeared in the Probate Court and filed exceptions to the accounts of Goyer and Johnson, which had been confirmed by that court in 1865. These exceptions were set for hearing, and a copy thereof, together with a notice of the time and place of hearing the same by the court, was mailed to Johnson at Memphis.

Johnson again failed to appear. The exceptions were sustained, and, on February 2, 1888, the Probate Court adjudged that the executors had been improperly credited in the former settlement with the \$61,040.10 paid the widow, and that they had received \$30,000 besides, which they had not reported or accounted for in any way. The court further adjudged that these two sums, together with interest thereon, in all \$130,640, remained, or should be, in the hands of the executors for distribution; and it was ordered that Johnson, as surviving executor, proceed to distribute said sum of \$130,640 according to the will of John W. Todd, deceased, and according to law.

That judgment is the principal ground of the present action. On March 28, 1888, Mrs. Fitzsimmons and the other four residuary legatees, by themselves and their representatives, filed this bill in the Chancery Court at Memphis, to recover from Johnson, as surviving executor, and from the estate of Goyer, the deceased executor, the said \$130,640, and other sums alleged to have been received by the same persons as executors of John W. Todd's estate in Tennessee.

The chancellor dismissed the bill on demurrer, so far as relief was sought on the Ohio record, but retained it for other purposes, to be hereafter stated. After final decree on the merits of the other branch of the cause, both complainants and defendants appealed to this court. All material questions raised in the Chancery Court are presented here by assignments of error.

Was that part of the bill seeking relief on the judgment of the Probate Court in Ohio properly dismissed?

The main ground of demurrer to that part of the bill was want of jurisdiction in that court to pronounce the judgment.

The question of the court's jurisdiction of the subject-matter need not be discussed or elaborated, for, by the statute of Ohio, her Probate Courts are given general jurisdiction to settle the accounts of executors and administrators, and to direct distribution of balance found in their hands. Jurisdiction of the subject-matter was, therefore, ample and complete. Rev. Stat. Ohio, sect. 534.

Whether the court had jurisdiction of the person of Johnson is not so easily answered.

It is conceded in the bill and recited on the face of the record that Goyer was dead, and that Johnson, the surviving executor, was not personally served with notice, either of the appellate proceedings in

the Court of Common Pleas or of the subsequent proceedings in the Probate Court, which resulted in the judgment sued on; and that, being a non-resident, and without an attorney of record in the State, only publication was made for him.

It is now well settled that a personal judgment against a non-resident, rendered in an original suit, upon constructive notice — that is, upon notice by publication merely — is an absolute nullity, and of no effect whatever. Though a State may adopt any rules of practice and legal procedure she may deem best as to her own citizens, she can adopt none that will give her courts jurisdiction of non-residents so as to authorize personal judgments against them without personal service of process upon them.

By personal judgments we mean judgments *in personam* — as, for payment of money — in contradistinction from judgments *in rem*, whereby the property of non-residents, situated within the territorial limits of the State, may be impounded; for when non-residents own property in a particular State it is subject to the laws of that State, and may be attached or otherwise brought into *custodia legis* as security for the debts of the owners, and actually sold and applied by direction of the court, without personal service and by constructive notice merely. *Pennoyer v. Neff*, 95 U. S. 714.

The judgment before us is confessedly a personal judgment. Hence, if the appellate proceedings in the Court of Common Pleas and the subsequent proceedings in the Probate Court were original proceedings, standing upon the same ground with respect to notice as an original action, that judgment is void for want of jurisdiction of the person.

The demurrer assumed, and, in sustaining it, the chancellor held, that the petition in error, by which the cause was removed from the Probate Court to the Court of Common Pleas, was, in effect, an original action, and that it could be prosecuted only on notice by personal service; and that, it appearing that no such notice was given, the judgment sued upon was null and void.

We do not concur in the view that the petition in error was a new suit, or, that to entitle petitioner to prosecute the same, she must have given the defendant therein the same notice required in the commencement of an original action. In saying this, we are not unmindful of the fact that many of the authorities speak of a writ of error, whose office seems to be the same in most of the States as the petition in error under the Ohio law, as a new suit. Such is the language of some of the earlier decisions in Ohio. 3 Ohio, 337. In some of the cases in our own State a writ of error has been called a new suit (1 Lea, 290; 13 Lea, 151); in others it is said to be in the nature of a new suit (6 Lea, 83; 13 Lea, 206); and in still another the court says it is to be regarded as a new suit. 3 Head, 25. But in no case that we have been able to find, or to which our attention has been called, does the court decide that a writ of error

is a new suit in the sense of being the commencement of an original action, or that it requires the same character and stringency of notice as an original action.

In the very nature of the case a writ of error cannot be an original action. A writ of error lies alone in behalf of a party or privy to an original suit already finally determined in the lower court, and it must run against another party or privy to such original suit. A writ of error has no place in the law unless there has been an original action; and, where given scope, it is but a suit on the record in the original case.

The Supreme Court of the United States has several times said that a writ of error is rather a continuation of a certain litigation than the commencement of an original action, and we think that such it is, most manifestly. *Cohens v. Virginia*, 6 Wheaton, 410; *Clark v. Matthewson*, 12 Peters, 170; *Nations v. Johnson*, 24 Howard, 205; *Pennoyer v. Neff*, 95 U. S., 734.

A writ of error is like a new suit, in that it can be prosecuted only upon notice to the opposite party. But that notice need not be personal, as in the commencement of an original action; it may be either personal or constructive, as the State creating the tribunal may provide. 95 U. S., 734; 24 Howard, 206.

In 1865 Goyer and Johnson submitted themselves to the jurisdiction of the Probate Court of Ohio, for the purpose of settling their accounts, and then obtained a judgment in their favor. That judgment was subject to review, and, if erroneous, to reversal, by error proceedings in the Court of Common Pleas. Rev. Stat. Ohio, sect. 6708.

To obtain such revision or reversal, it was incumbent on the complaining party to give Goyer and Johnson, or the survivor of them, notice. Such notice was, by statute, authorized to be given in any one of three ways — namely, by service of summons on the adverse party in person, or by service on his attorney of record, or by publication. Rev. Stat., 6713.

Goyer being dead, and Johnson being a non-resident, and having no attorney in the State, publication was duly made at the instance of petitioner in error. That was all that was required by the law of Ohio, and we are of opinion that it gave the Appellate Court full jurisdiction of Johnson's person, and authorized any judgment that the merits of the case required, so far as he was concerned.

That court had complete power to reverse the judgment of the Probate Court, if found to be erroneous, and either to render such judgment as should have been rendered below in the first instance or to remand the case for further proceedings in the latter court. Rev. Stat., 6726.

The latter course was pursued, as has already been seen. Johnson, being properly before the Appellate Court by constructive service, was chargeable with notice of the reversal and remand of his

case, and of the subsequent proceedings in the Probate Court, without additional notice by publication or otherwise as to the steps taken under the *procedendo*. In that way he had his day in court when the large judgment was pronounced against him, and he is bound by it the same as if he had been personally served with process.

That constructive notice of a writ of error to a non-resident party, when such party was properly brought before the lower court, is sufficient to bind him by the judgment or decree rendered in the Appellate Court, was expressly decided in the case of *Nations v. Johnson*, 24 Howard, 195. In that case Johnson had sued Nations in the Chancery Court in Mississippi for some slaves. Decree was for Nations, and he afterward removed himself and the slaves to the State of Texas. Johnson prosecuted a writ of error to the Appellate Court of Mississippi, giving to Nations notice by publication only. The Appellate Court reversed the decree of the chancellor and pronounced a decree in favor of Johnson.

Subsequently Johnson sued Nations in one of the District Courts of the United States, in the State of Texas, on his decree rendered by the State Court in Mississippi. Nations defended on the ground that he had not been personally served with notice of the writ of error to the Appellate Court. That question being decided against him, not upon the facts but upon the law, in the District Court, Nations prosecuted a writ of error to the Supreme Court of the United States, with the result already stated. In the opinion, Mr. Justice Clifford, speaking for a unanimous court, said: "No rule can be a sound one which, by its legitimate operation, will deprive a party of his right to have his case submitted to the Appellate Court; and where, as in this case, personal service was impossible in the Appellate Court, through the act of the defendant in error, it must be held that publication according to the law of the jurisdiction, is constructive notice to the party, provided the record shows that process was duly served in the subordinate court, and that the party appeared and litigated the merits. . . . Common justice requires that a party, in cases of this description, should have some mode of giving notice to his adversary; and where, as in this case, the record shows that the defendant appeared in the subordinate court and litigated the merits to a final judgment, it cannot be admitted that he can defeat an appeal by removing from the jurisdiction, so as to render personal service of the citation impossible. On that state of facts, service by publication according to the law of the jurisdiction and the practice of the court, we think, is free from objection, and is amply sufficient to support the judgment of the Appellate Court." 24 Howard, 205, 206.

The same rule is announced in *Pennoyer v. Neff*, 95 U. S. 734.

Text-writers lay it down as a general rule that jurisdiction once acquired over the parties in the lower court may be continued until

the final termination of the controversy in the Appellate Court by giving proper notice of the appellate proceedings, and that notice to a non-resident party by publication merely is sufficient. Freeman on Judgments, sect. 569; 2 Black on Judgments, sect. 912.

This rule commends itself to all men for its wisdom and justice. If it did not prevail, a man having an unjust judgment in a subordinate court, might, by removal from that State, cut off, absolutely, the right of the adverse party to a hearing in the Appellate Court on writ of error; and, having done so, he might then enforce his unjust judgment. The adverse party would be powerless in such a case. He could get relief neither in the courts of the State in which the judgment was rendered, nor in those of the State to which the other party had removed; for, in the former jurisdiction, the judgment would be conclusive upon him, and if he should go to the latter to relitigate his rights, he would be met and defeated by the previous adjudication of the same rights. One judgment would control the other, on the doctrine that the judgment of a competent court in one State is entitled to the same faith and credit in the courts of every other State as it would receive in those of the State where rendered; which doctrine will be considered hereafter.

It is not to be implied that Johnson and Goyer returned to Tennessee to hold or obtain any supposed advantage, for they were *bona fide* citizens of this State all along. But the *bona fides* of the removal does not affect the rule.<sup>1</sup>

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## PERMANENT BUILDING AND INVESTMENT ASSOCIATION v. HUDSON.

SUPREME COURT OF QUEENSLAND. 1896.

[Reported 7 *Queensland Law Journal*, 23.]

**APPLICATION** by the Permanent Building and Investment Association, Ltd., to enforce a judgment for £130 9s. 5d., recovered by them in the Supreme Court of New South Wales, against George Hudson, of Ipswich, in the colony of Queensland.

In 1887 Hudson, who was then residing in Sydney, bought 190 shares in the plaintiff company, and was duly registered as owner of the shares. In 1889 he came to reside in Queensland, and from that year onward he continued to reside in Queensland, paying occasional holiday visits to New South Wales. In 1896 an action was commenced in the Supreme Court of New South Wales against the defendant for calls due in respect of his shares in the plaintiff company. The defendant was served with the writ at Ipswich, but did

<sup>1</sup> See *Weaver v. Boggs*, 38 Md. 255; *Elsasser v. Haines*, 52 N. J. L. 10, 18 Atl. 1095. — Ed.

not enter an appearance, and the plaintiffs obtained judgment by default for £130 9s. 5d.

On the 8th of May leave was granted by Cooper, J., to the plaintiffs to issue a summons under s. 22 of the Common Law Process Act of 1867, calling on the defendant to show cause why the judgment should not be enforced by the Supreme Court of Queensland. The summons, which was returnable before the Chief Justice in Chambers, was adjourned into court.<sup>1</sup>

GRIFFITH, C. J. I do not think there is room for any doubt in this matter. I think the law upon it has been free of doubt for the last ten years. The courts of a country have jurisdiction over the persons within that country. Also, as a matter of practice, they assert jurisdiction — always under the authority of some statute of their own country — in their own country, with respect to persons out of the jurisdiction as to contracts made or acts done within the jurisdiction. That is extremely convenient. It is a power conferred by their own legislature, and it holds good within their own jurisdiction, but the voice of the legislature does not extend beyond its jurisdiction. International Law does not, as far as I know, require any country to recognize the jurisdiction or authority of any foreign body or tribunal over its citizens, or over any one who was not a citizen of the country within which that foreign body or tribunal has jurisdiction. Writs in New South Wales run as far as the border of New South Wales, and no further. Beyond that they are mere pieces of paper — mere notices. In the case of the colonies which have joined the Federal Council it is different. Their writs in cases where the cause of action arose in the colony in which the action is brought, run throughout federated Australia. New South Wales has not thought fit to join in that federation, and writs from that colony, as I have said, stop at the border. This judgment, therefore, was obtained in the Supreme Court of New South Wales against a person who owed no allegiance to that court. The document served on him was only a piece of paper, to which, in my opinion, he was in no way bound to pay attention, and which had no effect in this colony, although in New South Wales it had ample effect, but only because the legislature there had said so. The application must be dismissed with costs.<sup>2</sup>

<sup>1</sup> The arguments of counsel are omitted. — ED.

<sup>2</sup> *Acc.* Brisbane Oyster Fishery Co. v. Emerson, Knox (N. S. W.) 80; Polack v. Schumacher, 3 So. Austr. R. 76; Bangarusami v. Balasubramanian, Ind. L. R. 12 Mad. 496. — ED.

VAN HEYDEN *v.* SAUVAGE.

CIVIL COURT OF THE SEINE. 1894.

[Reported 22 *Clunet*, 592.]

THE COURT. By a parol contract of sale, March 11, 1893, at Paris, Vanderheyden sold Count de Sauvage-Vercourt, with all usual warranties, for 3,000 francs, a saddle horse, to be delivered at the buyer's house at Emptinne, county of Dinant, Belgium. The very day after the delivery the buyer asserted that not only did the animal sold possess none of the qualities represented, but had many serious defects. All proposals of compromise, however advantageous to the seller, were checked by the refusal of the latter to take back the horse. In these circumstances, Sauvage sued Vanderheyden for a rescission of the sale in the court of his domicile, at Dinant. Vanderheyden having suffered judgment by default, consented to contest the question in the Belgian court and opposed the judgment. As a result of a new decree, confirmed by a judgment of the court of Liège, an examination by experts was made, at which Vanderheyden was present. The experts fully recognized the defects, and declared the horse absolutely "unfit for the use to which it was destined." Consequently, the court of Dinant rescinded the sale; Vanderheyden appealed, and the matter is now pending before the court of Liège.

Without waiting the final result of a suit the issue of which he feared, Vanderheyden, abandoning the first process, sued his adversary in his turn before the court of his own domicile in the present action to recover the price of the horse. Sauvage prays for a continuance till the court of Liège shall finally determine the suit pending before it; but Vanderheyden opposes the motion on the ground that the plea of *litispendance* cannot be allowed, since the French and Belgian courts are independent. The French courts, to be sure, are not bound by foreign judgments; but a Frenchman is not forbidden in an action against him by a foreigner to accept trial before the court of his adversary's domicile; but by this very acceptance he has clearly substituted the foreign judges for his own natural judges, and consequently has attributed to their decision the same effects as a decision of the court of his own domicile would have. Now Vanderheyden wishes to turn to the French courts after having pleaded before the Belgian; that is to say, to litigate the same question successively before two courts, so as to take advantage of the chances of a double process. Such an attempt is allowed neither in equity nor in law. In fact, it is impossible to allow any process, before whatever court, French or foreign, it be brought, to be abandoned at the caprice or at the interest of a party who thus retains in advance the chance of accepting or of rejecting the decision of the court according as it may be favorable or the reverse. The accept-



ance of such a rule would as a result give the most shocking advantage to the rash or dishonest party who could thus, on his own authority and to his sole profit, nullify a decision which finds his adversary entitled, and compel the latter to submit to the chances of a new suit before foreign judges.

In short, two courts of the same sort cannot take cognizance at the same time of the same suit, though one be French, the other foreign. Vanderheyden, in accepting Belgian jurisdiction, has at the same time closed every means of recourse to the jurisdiction of his own country; after having submitted to trial before the court of Dinant, been present at the expert examination and taken an appeal from the decision, it is not now lawful to disregard all its effects, and to consider the former suit as non-existent. In a word, he has by his own will entered into a judicial contract with his adversary, by virtue of which the Belgian jurisdiction has been and should remain alone competent to decide the case.

The Court for these reasons declares itself incompetent; declares Vanderheyden without right to sue, and sends the affair back to the court which has already taken jurisdiction.

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### GIRARD v. TRAMONTANO.

COURT OF APPEAL OF NAPLES. 1883.

[Reported 12 *Clunet*, 464.]

IN accordance with the terms of Art. 14 of the French Civil Code, Mr. Tramontano, an Italian subject domiciled in Italy, was sued by Girard & Co. in the Tribunal of Commerce of the Seine, upon the balance of an account. Judgment for the plaintiff, and application to the Court of Appeal of Naples for an *exequatur*.

THE COURT. When the execution of a foreign judgment is asked for in Italy, the first duty of the Italian judges, by Art. 941 of the Code of Civil Procedure, is to make sure that the judgment was rendered by a court that had jurisdiction. It is usually necessary, to be sure, in determining this point, to be governed by the law of the country in which the judgment was rendered (Art. 10 of the preliminary dispositions of the Civil Code). But the provisions of Art. 14 of the French Civil Code are not sufficient to confer jurisdiction on the Tribunal of Commerce of the Seine. . . .

This text, to be sure, provides that even a foreigner non-resident in France may always be cited before a French court upon obligations toward a Frenchman, though contracted abroad. But this unlimited power given to the French creditor is manifestly opposed to Art. 12 of the Preliminary Dispositions of the Civil Code.<sup>1</sup> It is

<sup>1</sup> "In no case shall the laws, contracts, or judgments of a foreign country or the provisions of a private contract have power to derogate from the laws of this kingdom

contrary to the provisions of Art. 105, number 2, of the Code of Civil Procedure, submitting to Italian jurisdiction suits relative to obligations performable in Italy, or resulting from contracts made or acts done in the kingdom. It thus contains a usurpation of jurisdiction that belongs to the Italian courts. It sets up an extravagant claim of jurisdiction, contrary to the law of nations, and therefore not to be recognized in any State whose municipal public law it violates.

It is in vain to urge that a foreigner in contracting with a Frenchman, whenever he knows the provisions of Art. 14 of the Code Napoleon, is regarded as having waived the right of being judged by his natural judges. For the individual who cannot by his own will obtain within his own country other judges than those provided by the laws of the State, cannot, *a fortiori*, escape the rules of competence established by public international law.

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### MASSIE v. WATTS.

SUPREME COURT OF THE UNITED STATES. 1810.

[Reported 6 Cranch, 148.]

THIS was an appeal from the decree of the Circuit Court of the United States for the District of Kentucky, in a suit in equity brought by Watts, a citizen of Virginia, against Massie, a citizen of Kentucky, to compel the latter to convey to the former 1,000 acres of land in the State of Ohio, the defendant having obtained the legal title with notice of the plaintiff's equitable title.<sup>1</sup>

MARSHALL, C. J. This suit having been originally instituted, in the court of Kentucky, for the purpose of obtaining a conveyance for lands lying in the State of Ohio, an objection is made by the plaintiff in error, who was the defendant below, to the jurisdiction of the court by which the decree was rendered.

Taking into view the character of the suit in chancery brought to establish a prior title originating under the land law of Virginia against a person claiming under a senior patent, considering it as a substitute for a *caveat* introduced by the peculiar circumstances attending those titles, this court is of opinion, that there is much reason for considering it as a local action, and for confining it to the court sitting within the State in which the lands lie. Was this cause, therefore, to be considered as involving a naked question of

relating to persons, to property, or to obligations, nor from those which in any way concern the public order and good morals."

<sup>1</sup> The statement of facts is omitted. Only so much of the opinion as deals with the question of jurisdiction is given. — Ed.

title, was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

In the celebrated case of *Penn v. Lord Baltimore*, the Chancellor of England decreed a specific performance of a contract respecting lands lying in North America. The objection to the jurisdiction of the court, in that case, as reported by Vezey, was not that the lands lay without the jurisdiction of the court, but that, in cases relating to boundaries between provinces, the jurisdiction was exclusively in the king and council. It is in reference to this objection, not to an objection that the lands were without his jurisdiction, that the chancellor says, "This court, therefore, has no original jurisdiction on the direct question of the original right of boundaries." The reason why it had no original jurisdiction on this direct question was, that the decision on the extent of those grants, including dominion and political power, as well as property, was exclusively reserved to the king in council.

In a subsequent part of the opinion, where he treats of the objection to the jurisdiction of the court, arising from its inability to enforce its decree *in rem*, he allows no weight to that argument. The strict primary decree of a court of equity is, he says, *in personam*, and may be enforced in all cases where the person is within its jurisdiction. In confirmation of this position he cites the practice of the courts to decree respecting lands lying in Ireland and in the colonies, if the person against whom the decree was prayed be found in England.

In the case of *Arglasse v. Muschamp*, 1 Vernon, 75, the defendant, residing in England, having fraudulently obtained a rent charge on lands lying in Ireland, a bill was brought in England to set it aside. To an objection made to the jurisdiction of the court the chancellor replied: "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you that you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local,

and so wholly elude the jurisdiction of this court." The chancellor, in that case, sustained his jurisdiction on principle, and on the authority of *Archer and Preston*, in which case a contract made respecting lands in Ireland, the title to which depended on the act of settlement, was enforced in England, although the defendant was a resident of Ireland, and had only made a casual visit to England. On a rehearing before Lord Keeper North this decree was affirmed.

In the case of *The Earl of Kildare v. Sir Morrice Eustace and Fitzgerald*, 1 Vern. 419, it was determined that if the trustee live in England, the chancellor may enforce the trust, although the lands lie in Ireland.

In the case of *Toller v. Carteret*, 2 Vern. 494, a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the court, the person of the mortgagor being within it.

Subsequent to these decisions was the case of *Penn against Lord Baltimore*, 1 Vez. 444, in which the specific performance of a contract for lands lying in North America was decreed in England.

Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.

The inquiry, therefore, will be, whether this be an unmixed question of title, or a case of fraud, trust, or contract.

The facts in this case, so far as they affect the question of jurisdiction, are, that, in 1787, the land warrant, of which Watts is now the proprietor, and which then belonged to Oneal, was placed without any special contract in the hands of Massie, as a common locator of lands. In the month of August in the same year he located 1,000 acres, part of this warrant, to adjoin a previous location made on the same day for Robert Powell.

In the year 1793 Massie, as deputy-surveyor, surveyed the lands of Thomas Massie, on which Robert Powell's entry depended, and the land of Robert Powell, on which Oneal's entry, now the property of Watts, depended. On the 27th of June, 1795, Nathaniel Massie, the plaintiff in error, entered for himself 2,366 acres of land to adjoin the surveys made for Robert Powell, Thomas Massie, and one Daniel Stull. The entry of Daniel Stull commences at the upper corner of Ferdinand Oneal's entry on the Scioto, and the entry of Ferdinand Oneal commences at the upper corner of Robert Powell's entry on the Scioto; so that the land of Oneal would be supposed, from the entries, to occupy the space on the Scioto between Powell and Stull. Nathaniel Massie's entry, which was made after surveying the lands of Thomas Massie and of Robert Powell, binds on the Scioto, and occupies the whole space between Powell's survey and Stull's survey.

In the year 1796, Nathaniel Massie surveyed 530 acres of Oneal's entry, chiefly within Stull's survey, and afterwards, in the spring of 1797, purchased Powell's survey. Nathaniel Massie's entry is surveyed and patented. In 1801 Massie received from Watts, in money, the customary compensation for making his location.

It is alleged that Nathaniel Massie has acquired for himself the land which was comprehended within Oneal's entry, and has surveyed for Oneal land to which his entry can by no construction be extended.

If this allegation be unsupported by evidence, there is an end of the case. If it be supported, had the court of Kentucky jurisdiction of the cause?

Although no express contract be made, yet it cannot be doubted that the law implies a contract between every man who transacts business for another at the request of that other and the person for whom it is transacted. A common locator who undertakes to locate lands for an absent person is bound to perform the usual duties of a locator, and is entitled to the customary compensation for those duties. If he fails in the performance of those duties, he is liable to the action of the injured party, which may be instituted wherever his person is found. If his compensation be refused, he may sue therefor in any court within whose jurisdiction the person for whom the location was made can be found. In either action the manner in which the service was performed is inevitably the subject of investigation, and the difficulty of making it cannot oust the court of its jurisdiction.

From the nature of the business and the situation of the parties, the person for whom the location is made being generally a non-resident, and almost universally unacquainted with the country in which his land is placed, it is the duty of the locator not only to locate the lands, but to show them to the surveyor. He also necessarily possesses the power to amend or to change the location if he has sufficient reason to believe that it is for the interest of his employer so to do. So far as respects the location he is substituted in the place of the owner, and his acts done *bona fide* are the acts of the owner.

If, under these circumstances, a locator finding that the entry he has made cannot be surveyed, instead of withdrawing it or amending it so as to render it susceptible of being carried into execution, secures the adjoining land for himself, and shows other land to the surveyor which the location cannot be construed to comprehend, it appears to this court to be a breach of duty, which amounts to a violation of the implied contract, and subjects him to the action of the party injured.

If the location be sustainable, and the locator, instead of showing the land really covered by the entry, shows other land, and appropriates to himself the land actually entered, this appears to the court

to be a species of *mala fides* which will, in equity, convert him into a trustee for the party originally entitled to the land.

In either case the jurisdiction of the court of the State in which the person is found is sustainable.

If we reason by analogy from the distinction between actions local and transitory at common law, this action would follow the person, because it would be founded on an implied contract, or on neglect of duty.

If we reason from those principles which are laid down in the books relative to the jurisdiction of courts of equity, the jurisdiction of the court of Kentucky is equally sustainable, because the defendant, if liable, is either liable under his contract, or as trustee.<sup>1</sup>

### WHITE v. WHITE.

COURT OF APPEALS, MARYLAND. 1835.

[Reported 7 Gill & Johnson, 208.]

BUCHANAN, C. J. The bill in this case was filed for the sale of the real estate of Abraham White, deceased, and the distribution of the proceeds among his heirs, after deducting the amount of a subsisting lien, by mortgage, on a part of it; on the ground that it will not admit of an advantageous division, and that it would be to the advantage of all the parties interested, that it should be sold, which is admitted by the answers. A tract of land, part of this estate, is stated in the bill, to lie in the State of Pennsylvania, as to which the chancellor dismissed the bill for the want of jurisdiction, and decreed a sale of that portion of the property, which lies in this State, appointing a trustee for that purpose. And the only question is, whether he should not also have decreed a sale by the trustee, of the tract of land in Pennsylvania.

It would be rather an idle thing in chancery, to entertain jurisdiction of a matter not within its reach, and make a decree which it could have no power to enforce, or to compel a compliance with. And the absence of that very power is a good test by which to try the question of jurisdiction. It would be a solecism to say, that the chancellor has jurisdiction to decree *in rem*, where the thing against

<sup>1</sup> *Acc. Penn v. Lord Baltimore*, 1 Ves. Sr. 444; *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117; *Cloud v. Greasley*, 125 Ill. 313, 17 N. E. 826; *Reed v. Reed*, 75 Me. 264; *Brown v. Desmond*, 100 Mass. 267; *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551; *Gardner v. Ogden*, 22 N. Y. 327; *Guerrant v. Fowler*, 1 Hen. & M. 5; *Poindexter v. Burwell*, 82 Va. 507.

So a court of equity has jurisdiction to enjoin the conveyance of foreign land: *Frank v. Peyton*, 82 Ky. 150; and to enjoin the obstruction of a foreign private way: *Alexander v. Tolleston Club*, 110 Ill. 65. — Ed.

which the decree goes, and is alone the subject of, and to be operated upon by it, is beyond the territorial jurisdiction of the Chancery Court, and not subject to its authority, and the decree, if passed, would itself be nugatory for the want of power, or jurisdiction to give it effect. Chancery can have no jurisdiction where it can give no relief. Now what jurisdiction has the Chancery Court of Maryland over lands lying in a foreign country, or in another State; and having no jurisdiction of lands so situated, what authority has it to decree a sale of them, and impart to its trustee authority to go into such State, or foreign country, to carry its decree into effect, by making sale of them.

It is true that where the decree sought is *in personam*, and may be carried into effect by process of contempt, the Court of Chancery here may have jurisdiction, although it may affect land lying in another State, the defendant being in the State of Maryland, as in a case of trust, or fraud, or of contract. As where a bill is filed against a person in this State, for the specific performance of a contract, or agreement, relating to land in another State. In such a case, the decree does not act directly upon the land, but upon the defendant here, and within the jurisdiction of the court. So where the land itself that is sought to be affected lies within the State, and the proceedings are against a person residing out of the State.

But in this case the bill seeks a sale of land in Pennsylvania, not within the jurisdiction of the Court of Chancery of Maryland; and the decree if made would not be *in personam*, but for the sale of the land, through the instrumentality of a trustee, and could not be enforced by any process from that court. It is not like the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, where the bill was for the specific performance of articles concerning the boundaries of the then provinces of Maryland and Pennsylvania, Lord Baltimore the defendant being in England, and subject to the compulsory process of chancery there. Nor like the other cases to be found in the English Chancery reports, affecting lands not lying in England, where the proceedings were *in personam*, the defendants residing there, and subject to process of contempt, etc.

*Decree affirmed with costs.*<sup>1</sup>

<sup>1</sup> *Acc. Watkins v. Holman*, 16 Pet. 25; *Johnson v. Kimbro*, 3 Head, 557; *Gibson v. Burgess*, 82 Va. 650. But see *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Wood v. Warner*, 15 N. J. Eq. 81.

Similarly, a court of equity may not order the abatement of a foreign nuisance: *P. v. Central R. R.*, 42 N. Y. 283; nor grant specific performance of a contract to dig a ditch in a foreign state: *Port Royal R. R. v. Hammond*, 58 Ga. 523; nor declare a deed of foreign land void: *Carpenter v. Strange*, 141 U. S. 87; *Davis v. Headley*, 22 N. J. Eq. 115; but see *C. v. Levy*, 23 Grat. 21. — Ed.

LYNDE v. COLUMBUS, CHICAGO AND INDIANA  
CENTRAL RAILWAY.

CIRCUIT COURT OF THE UNITED STATES. 1893.

*[Reported 57 Federal Reporter, 993.]*

BAKER, District Judge. The plaintiff brings this suit as a bondholder for whom the trustee has refused to bring suit against the Columbus, Chicago & Indiana Central Railway Company, Archibald Parkhurst, trustee, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, for the foreclosure of a trust deed or mortgage executed by the Columbus, Chicago & Indiana Central Railway Company to Archibald Parkhurst, as trustee, to secure 1,000 bonds, of \$1,000 each, issued by it, and asking for the sale of its railroad embraced in said trust deed, extending from Indianapolis, Ind., to Columbus, Ohio, together with its franchises, equipments, property, tolls, and interests, — that is to say, the lands, tenements, hereditaments, fixtures, goods, and chattels of the Columbus, Chicago & Indiana Central Railway Company; its property, rights, privileges, interest, and estate of every description and nature; its rails, ties, fences, buildings, and erections; its right of way, cars, engines, tools, and machinery; its rents, reservations, and reversions, of every nature, or so much thereof as lies and is within the State and district of Indiana. The bill avers that the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company claims some interest in the said premises, and prays that it may be required to make answer to, all and singular, the allegations and charges contained in the bill, and that said property may be decreed to be sold free and discharged from any and all claims or interest of the parties respondent to the bill.

The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company has filed a plea alleging, in substance, that the plaintiff herein, as plaintiff, brought suit against the defendants herein, as defendants, on the same bonds and trust deed or mortgage, in the common pleas court of Franklin County, Ohio; that said court is a court of general jurisdiction in law and equity; that the cause was tried, and that the court found the bonds in question to be valid obligations of the Columbus, Chicago & Indiana Central Railway Company, and that the plaintiff was entitled to a decree for their payment; and the court decreed that unless the defendant the Columbus, Chicago & Indiana Central Railway Company should, within thirty days, pay, or cause to be paid, the sum so found due, the mortgage should be foreclosed, and the mortgaged property sold, and that upon the sale the purchaser should be entitled to hold said railway and property free and discharged from the lien or incumbrance of all the parties to the suit. The plaintiff has set the plea down for argument, and the question raised is whether the



facts pleaded are sufficient to constitute a bar to the maintenance of the present suit.

The plaintiff contends that the plea is insufficient because it contains no averment that either the mortgagor, the Columbus, Chicago & Indiana Central Railway Company, or the mortgagee, Archibald Parkhurst, trustee, was brought within the jurisdiction of the court in Ohio by process personally served, or by appearance in person or by attorney. The plea avers that the said Charles R. Lynde filed his bill of complaint, denominated by the law of the State of Ohio a "petition," against this defendant and its codefendants the Columbus, Chicago & Indiana Central Railway Company and Archibald Parkhurst, trustee, and it then proceeds to aver that the cause was heard, and a decree rendered against all the defendants; but it fails to show affirmatively that the court acquired jurisdiction of the persons of the defendants, either by service of process or by appearance.

Pleas in bar, in suits in equity, are not favorites of the law, because the defendant has other and ample modes of defence open to him. They are therefore required to be drawn with precision, and must disclose upon their face a complete defence. The facts necessary to render the plea an equitable bar to the case made by the bill must be clearly and distinctly averred, and such plea will not be aided by argument, inference, or intendment. *McCloskey v. Barr*, 38 Fed. Rep. 165. This rule, however, is not to be construed as conflicting with that other salutary rule that legal presumptions ought not to be stated in a pleading. Steph. Pl. (1871) p. 312 *et seq.* When the facts are stated from which the law raises a certain legal presumption, it is not necessary for the pleader to do more, in order to have the benefit of such legal presumption. In the case of *Galpin v. Page*, 18 Wall. 350, the rule is thus stated: "It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law, in such cases, are in favor of its acts. It is presumed to have jurisdiction to give the judgment it rendered, until the contrary appears; and this presumption embraces jurisdiction, not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court, or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant, or his appearance in the action. But when the former exists the latter will be presumed. This is familiar law, and it is asserted in all the adjudged cases. The rule is different with respect to courts of special and limited authority. As to them, there is no presumption of law in favor of their jurisdiction. That must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face."

The judgment in question was rendered by a court having general

jurisdiction in law and equity, and the legal presumption is that the court had jurisdiction of the parties and subject-matter, and had power to pronounce the judgment it did; and this presumption cannot be overcome, except by averment and proof that it proceeded without jurisdiction. It is true that, when the record of a former judgment is set up as establishing some collateral fact involved in a subsequent litigation, it must be pleaded strictly as an estoppel; and the rule is that such pleading must be framed with the utmost precision, and it cannot be aided by inference or intendment. When, however, a former judgment or decree is set up in bar of a subsequent action, or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters set up in the antecedent pleading of the opposite party. *Aurora City v. West*, 7 Wall. 82; *Gray v. Pingry*, 17 Vt. 419; *Perkins v. Walker*, 19 Vt. 144; 1 Greenl. Ev. (12th ed.) p. 566; *Shelley v. Wright*, Willes, 9. The plea is not bad for failing to aver that the court had acquired jurisdiction over the parties by service of process or appearance. If, in truth, the court proceeded to render the decree in question without having acquired jurisdiction of the defendants, that fact, to avail the plaintiff here, should have been set up by replication, instead of setting the plea down for argument. *Rogers v. Odell*, 39 N. H. 452; *Spaulding v. Baldwin*, 31 Ind. 376; *Biddle v. Wilkins*, 1 Pet. 686; *Pennington v. Gibson*, 16 How. 65; *Campe v. Lassen*, 67 Cal. 139, 7 Pac. Rep. 430; *Vanfleet*, Collat. Attack, §§ 846 and 847, and authorities there cited.

It follows that the sufficiency of the plea must be determined on the assumption that the court in Ohio had jurisdiction of the defendants when the cause before it was heard and decided. The cause of action there was founded on the same bonds and mortgage or trust deed which constitute the cause of action here. The mortgage or trust deed in suit was executed by a railroad corporation organized by the consolidation of two corporations, one of which was organized under the laws of the State of Ohio, and the other under the laws of the State of Indiana. The consolidated company, presumably, became invested with all the property and franchises of the constituent corporations. Its franchise to be a consolidated corporation, and to build, own, and operate a line of railway extending from Columbus, Ohio, to Indianapolis, Ind., is undoubtedly an entirety, while the immovable property of the company covered by the mortgage has its situs in both States. It is earnestly insisted that the decree of the Ohio court is binding and conclusive because the court had jurisdiction of the parties and of the subject-matter, and that the present suit to foreclose the same mortgage or trust deed cannot be maintained because by that decree the right of action growing out of the bonds and mortgage has passed *in rem judicatam*. It is undoubtedly true that courts possessing general chancery powers have jurisdiction to relieve against fraud, to enforce trusts, and to compel the specific performance of contracts in relation to immovable

property having its situs elsewhere than in the state or country where the courts exist, whenever jurisdiction has been acquired, by appearance, or by personal service of process, over the persons on whom the obligation rests. *Penn. v. Lord Baltimore*, 1 Ves. Sr. 444; *Earl of Kildare v. Eustace*, 1 Vern. 419; *Arglasse v. Muschamp*, Id. 75; *Toller v. Carteret*, 2 Vern. 494; *Massie v. Watts*, 6 Cranch, 148; *Mills v. Duryea*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; *McGilvray v. Avery*, 30 Vt. 538; *Davis v. Headley*, 22 N. J. Eq. 115; *Dobson v. Pearce*, 12 N. Y. 156; *U. S. Bank v. Merchants' Bank of Baltimore*, 7 Gill, 415; *Burnley v. Stevenson*, 24 Ohio St. 474. In the case of fraud, trust, or contract, the jurisdiction of a court possessing general equity powers is sustainable wherever the person to be bound by the decree is found, though the decree may incidentally affect lands without its territorial jurisdiction. The decree proceeds *in personam*, and is binding on the conscience of the party; and the court may, by attachment or sequestration, compel the party to perform that which, in equity and good conscience, he ought to have done without coercion. *Aequitas agit in personam*. Conceding that the court in Ohio had jurisdiction of the parties and of the subject-matter, had it power, by its decree, to merge the lien of the mortgage on the property embraced therein, having its situs in Indiana? The Ohio court may compel the defendants to execute a conveyance or release of the mortgaged premises in such form as may be necessary to transfer the legal title to the property according to the law of this State, and such as will be sufficient to bar an action elsewhere.<sup>1</sup> The plea does not aver that the execution of any such conveyance or release has been compelled. Until such conveyance or release has been executed, the lien of the mortgage on the immovable property embraced in it, situated in this State, remains unaffected, unless the court in Ohio was clothed with power enabling it to affect the status of real estate outside of the State which created the court, by a decree operating *in rem*.

It is elementary that no sovereignty can extend its process beyond its own territorial limits, to subject persons or property to its judicial decisions. Every attempted exertion of authority of this sort beyond its limits is a mere nullity, incapable of binding such person or property in any other forum. Story, *Conf. Laws* (7th ed.), § 539. A suit cannot be maintained against a person so as absolutely to bind his property situated in another sovereignty, nor so as absolutely to bind his right and title to immovable property whose situs is elsewhere. "It is true," says Story in his *Conflict of Laws* (7th ed. § 543), "that some nations do, in maintaining suits *in personam*, attempt indirectly, by their judgments and decrees, to bind property situate in other countries; but it is always with the reserve that it binds the person only in their own courts, in regard to such property. And certainly there can be no pretense that such judgments or decrees bind the property itself, or the

<sup>1</sup> *Acc. Mead v. N. Y. H. & N. R. R.*, 45 Conn. 199; *Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103; *Union Trust Co. v. R. R.*, 102 N. Y. 729, 7 N. E. 822. — Ed.

rights over it which are established by the laws of the place where it is situate." And again he says: "In respect to immovable property, every attempt by any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be forever incapable of execution *in rem*." These principles have been recognized and acted upon by all courts as having their foundation in reason, and as essential to the peace and security of independent states. In *Watkins v. Holman*, 16 Pet. 25, it was held that a court of chancery might decree the conveyance of land in any other State, and might enforce the decree by process against the defendant, but that neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, could operate beyond the jurisdiction of the court. The same principle is affirmed and acted upon in *Boswell v. Otis*, 9 How. 336, and *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 233. Indeed, no principle is more firmly settled than that the disposition of real estate, whether by deed, descent, or any other mode, must be governed by the laws of the State where the land is situated. It is argued that, in respect of immovable property mortgaged by an interstate railway company, a different rule has been established by the case of *Muller v. Dows*, 94 U. S. 444. It is contended that the court there held that, as the railroad and its franchise were an entirety, any court having jurisdiction of the parties and subject-matter could make a valid decree of foreclosure, which would operate on the entire railroad property, as well without as within the State where the decree was pronounced, and that it would completely merge the lien of the mortgage. What was there said, giving apparent support to this contention, was merely *arguendo*, and was not essential to the judgment pronounced. In that case the Circuit Court of the United States for the District of Iowa passed a decree of foreclosure and sale of a railroad extending from a point in Iowa to a point in Missouri, and owned by a corporation formed by the consolidation of a corporation of Missouri with a corporation of Iowa. The entire line was covered by one trust deed, and the suit to foreclose was brought by the trustee. The mortgagees were also before the court, and the sale was made by a master at the instance of the trustee. It was held that the decree was not void, so far as it directed the foreclosure and sale of that part of the railroad lying in Missouri, and that the trustee could be required by the court in Iowa to make a deed to the purchaser in confirmation of the sale. In my judgment, this case does not overturn the well-established doctrine that a court in one State cannot pass a decree which shall operate to change the title to, or merge a lien upon, immovable property in another State. The title in that case was transferred by the court compelling the execution of a power of sale, and not by force of the decree. *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 39 Fed. Rep. 337; *Farmers' Loan & Trust Co. v. Postal Tel. Co.*, 55 Conn. 334, 11 Atl. Rep. 184. The case last cited is exactly in point. The Postal Telegraph Company, a New York corpo-

ration, mortgaged all its property, which was situated in several States, including Connecticut and New York, to the plaintiffs, in trust, to secure the payment of its bonds. Upon a failure to pay the interest, the plaintiffs brought a suit for a foreclosure in the Supreme Court in the city of New York. Judgment was rendered for the plaintiffs, pursuant to which a referee was appointed, who sold all the property, including the real estate in Connecticut, and executed a conveyance of the same to the purchaser. Suit was brought to foreclose the mortgage on the Connecticut property, according to the laws and practice in that State. The defendant, the Benedict & Burnham Manufacturing Company, an attaching creditor, appeared, and set up a special defence, alleging the foreclosure and proceedings in the State of New York. The defence was held insufficient, on the ground that the decree and proceedings had thereunder were nugatory as to the real estate situate in Connecticut. In my judgment, the doctrine of this case presents the better view, and it must be held that the decree of the Ohio court did not merge the lien of the mortgage on the real estate in Indiana.

It results from these views that the plea is insufficient, and it is so ordered, with leave to the defendant to answer within thirty days.

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### YOUNG v. DREYFUS.

COURT OF APPEAL OF PARIS. 1885.

[*Reported 12 Clunet, 539.*]

A COMPANY was formed at London in 1864 under the name of "The Saint-Nazaire Company, Limited." Its principal object was the purchase and resale of vast tracts of land situated in the neighborhood of the city of Saint-Nazaire, which they proposed to convert into docks, basins, quays, etc. The capital of the company, made up in accordance with the English law, was divided into shares of £20 each, £5 payable upon subscription, and the balance, as the company should need it, on call by the board of management.

After various vicissitudes, especially its consolidation with a company formed in France (the "Société de Commerce de France"), the English Saint-Nazaire Company was put into liquidation in England, and Mr. Young was appointed official liquidator by a decree of the Court of Chancery.

In 1877 Mr. Young, to meet the liabilities of the company, called upon the shareholders to complete the payment for their shares, amounting to £11 per share. Several shareholders not having satisfied the call, Mr. Young summoned them all before the Court of Chancery, and a decree of the Master of the Rolls [Rolls?] condemned them to pay the amounts claimed.

To secure the execution of this decree against the French share-

holders, Mr. Young brought an action against them, in his own name, before the Civil Tribunal of the Seine, to have the decree of the Court of Chancery of December 7, 1877, declared executory in France. By additional and subsidiary demands alleged to the lower court, Mr. Young claimed in his own name, in case the tribunal should not declare the English decree executory, that each of the defendants be adjudged to pay the amounts decreed against them in said decree, which represented the balances unpaid of the sums subscribed. On their part, the shareholders set up the lack of jurisdiction of the English court, and, as a result, the nullity of the decree; alleging also, as to the additional claims, the incompetence of the Civil Tribunal of the Seine, because "The Saint-Nazaire Company, Limited" was a commercial company.

On August 24, 1881, the Civil Tribunal of the Seine rejected the liquidator's claim. On his appeal, the Court of Paris affirmed the judgment in the following terms:—

THE COURT. As to the jurisdiction of the English courts, Article 14 of the Civil Code authorizes a French plaintiff to cite a foreigner before the French tribunals, even upon obligations contracted in foreign countries. The object of this provision, containing as it does an exception to the rule *actor forum sequitur rei*, is to assure to a Frenchman the benefit of the national courts. It follows, *a fortiori*, that a defendant cannot, contrary to the rules of the common law, be withdrawn from his natural judges. Foreign courts are therefore, on principle, incompetent as concerns him. Nor is the case changed by the terms of Art. 59, § 5, of the Code of Civil Procedure, giving jurisdiction, in the case of partnerships, to the court of the place where the principal office is established. The provisions of this article govern the competence of French courts only with respect to persons justiciable in France; they are not to be extended further. Though the rules of competence in favor of French citizens are not rules of public order, and in consequence a Frenchman may waive the benefit of them, such waiver of a right cannot be presumed, and should be as certain and explicit as the right itself. In this case it is established neither by the by-laws of the English company nor by any of the documents produced. The mere fact of having subscribed to or bought shares in a foreign company cannot be considered as conferring jurisdiction.

## SECTION III.

## JURISDICTION QUASI IN REM.

## PENNOYER v. NEFF.

SUPREME COURT OF THE UNITED STATES. 1878.

*[Reported 95 United States, 714.]*

FIELD, J.<sup>1</sup> This is an action to recover the possession of a tract of land, of the alleged value of \$15,000, situated in the State of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of September 27, 1850, usually known as the Donation Law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the circuit courts of the State. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than \$300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the State; that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a non-resident and absent defendant who has property within the State. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, "unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein, and in the last case only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean, that in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is

<sup>1</sup> Arguments of counsel and part of the dissenting opinion are omitted. — Ed

established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. *D'Arcy v. Ketchum et al.*, 11 How. 165. In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit *to the satisfaction of the court or judge*, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the "affidavit of the printer, or his foreman, or his principal clerk," is satisfied when the affidavit is made by the editor of the paper. The term "printer," in their judgment, is there used not to indicate the person who sets up the type—he does not usually have a foreman or clerks; it is rather used as synonymous with publisher. The Supreme Court of New York so held in one case,—observing that, for the purpose of making the required proof, publishers were "within the spirit of the statute." *Bunce v. Reed*, 16 Barb. (N. Y.) 350. And, following this ruling, the Supreme Court of California held that an affidavit made by a "publisher and proprietor" was sufficient. *Sharp v. Daugney*, 33 Cal. 512. The term "editor," as used when the statute of New York was passed, from which the Oregon law is borrowed, usually included not only the person who wrote or selected the articles for publication, but the person who published the paper and put it into circulation. Webster, in an early edition of his Dictionary, gives as one of the definitions of an editor, a person "who superintends the publication of a newspaper." It is principally since that time that the business of an editor has been separated from that of a publisher and printer, and has become an independent profession.

If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted



upon here, that the judgment in the State court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand of a resident creditor except by a proceeding *in rem*; that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, *Confl. Laws*, c. 2; Wheat. *Int. Law*, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists as an elementary principle that the laws of one State have no operation outside of its territory except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, *Confl. Laws*, sect. 539.

But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them.

in an attempt to give extraterritorial operation to its laws, or to enforce an extraterritorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated. *Penn v. Lord Baltimore*, 1 Ves. 444; *Massie v. Watts*, 6 Cranch, 148; *Watkins v. Holman*, 16 Pet. 25; *Corbett v. Nutt*, 10 Wall. 464.

So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate.

These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus, in *Picquet v. Swan*, 5 Mason, 35, Mr. Justice Story said:—

“Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*.”

And in *Boswell's Lessee v. Otis*, 9 How. 336, where the title of the plaintiff in ejectment was acquired on a sheriff's sale, under a money decree rendered upon publication of notice against non-residents, in a suit brought to enforce a contract relating to land, Mr. Justice McLean said:—

“Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*.”

These citations are not made as authoritative expositions of the law; for the language was perhaps not essential to the decision of the cases in which it was used, but as expressions of the opinion of eminent jurists. But in *Cooper v. Reynolds*, reported in the 10th of Wallace, it was essential to the disposition of the case to declare the effect of a personal action against an absent party, without the jurisdiction of the court, not served with process or voluntarily submitting to the tribunal, when it was sought to subject his property to the payment of a demand of a resident complainant; and in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions, and the jurisdiction of the court over them. In that case, the action was for damages for alleged false imprisonment of the plaintiff; and upon his affidavit that the defendants had fled from the State, or had absconded or concealed themselves so that the ordinary process of law could not reach them, a writ of attachment was sued out against their property. Publication was ordered by the court, giving notice to them to appear and plead, answer or demur, or that the action would be taken as confessed and proceeded in *ex parte* as to them. Publication was had; but they made default, and judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession of the property, the original owner brought ejectment for its recovery. In considering the character of the proceeding, the court, speaking through Mr. Justice Miller, said:—

“Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and subject his property lying within the territorial jurisdiction of the court to the payment of that demand. But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within the territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case whether he appears or not. If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes in its

essential nature a proceeding *in rem*; the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions. First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

The fact that the defendants in that case had fled from the State, or had concealed themselves, so as not to be reached by the ordinary process of the court, and were not non-residents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court; and the grounds and extent of its authority over persons and property thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance.

The writer of the present opinion considered that some of the objections to the preliminary proceedings in the attachment suit were well taken, and therefore dissented from the judgment of the court; but to the doctrine declared in the above citation he agreed, and he may add, that it received the approval of all the judges. It is the only doctrine consistent with proper protection to citizens of other States. If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings

authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a State to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed, that, where they have property within the State, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law. The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. In

Webster v. Reid, reported in 11th of Howard, the plaintiff claimed title to land sold under judgments recovered in suits brought in a territorial court of Iowa, upon publication of notice under a law of the territory, without service of process; and the court said:—

“These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case, there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold.”

The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several States, as attempts have been made to enforce such judgments in States other than those in which they were rendered, under the provision of the Constitution requiring that “full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;” and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, “they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are or shall be taken.” In the earlier cases, it was supposed that the act gave to all judgments the same effect in other States which they had by law in the State where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the State itself to exercise authority over the person or the subject-matter. *M’Elmoyle v. Cohen*, 13 Pet. 312. In the case of *D’Arcy v. Ketchum*, reported in the 11th of Howard, this view is stated with great clearness. That was an action in the Circuit Court of the United States for Louisiana, brought upon a judgment rendered in New York under a State statute, against two joint debtors, only one of whom had been served with process, the other being a non-resident of the State. The Circuit Court held the judgment conclusive and binding upon the non-resident not served with process; but this court reversed its decision, observing, that it was a familiar rule that countries foreign to our own disregarded a judgment merely against the person, where the defendant had not been served with process nor had a day in court; that national comity was never thus extended; that the proceeding was deemed an illegitimate assumption of power, and resisted as mere abuse; that no faith and credit or force and effect had been given to such judgments

by any State of the Union, so far as known; and that the State courts had uniformly, and in many instances, held them to be void. "The international law," said the court, "as it existed among the States in 1790, was, that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State when the defendant had not been served with process or voluntarily made defence; because neither the legislative jurisdiction nor that of courts of justice had binding force." And the court held that the act of Congress did not intend to declare a new rule, or to embrace judicial records of this description. As was stated in a subsequent case, the doctrine of this court is, that the act "was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result, nor those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another." *The Lafayette Insurance Co. v. French et al.*, 18 How. 404.

This whole subject has been very fully and learnedly considered in the recent case of *Thompson v. Whitman*, 18 Wall. 457, where all the authorities are carefully reviewed and distinguished; and the conclusion above stated is not only reaffirmed, but the doctrine is asserted, that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence. In all the cases brought in the State and Federal courts, where attempts have been made under the act of Congress to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force, except as to property, or interests in property, within the State, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits. In *Bissell v. Briggs*, decided by the Supreme Court of Massachusetts as early as 1813, the law is stated substantially in conformity with these views. In that case, the court considered at length the effect of the constitutional provision, and the act of Congress mentioned; and after stating that, in order to entitle the judgment rendered in any court of the United States to the full faith and credit

mentioned in the Constitution, the court must have had jurisdiction not only of the cause, but of the parties, it proceeded to illustrate its position by observing, that, where a debtor living in one State has goods, effects, and credits in another, his creditor living in the other State may have the property attached pursuant to its laws, and, on recovering judgment, have the property applied to its satisfaction; and that the party in whose hands the property was would be protected by the judgment in the State of the debtor against a suit for it, because the court rendering the judgment had jurisdiction to that extent; but that if the property attached were insufficient to satisfy the judgment, and the creditor should sue on that judgment in the State of the debtor, he would fail, because the defendant was not amenable to the court rendering the judgment. In other words, it was held that over the property within the State the court had jurisdiction by the attachment, but had none over his person; and that any determination of his liability, except so far as was necessary for the disposition of the property, was invalid.<sup>1</sup>

In *Kilbourn v. Woodworth*, 5 Johns. (N. Y.) 37, an action of debt was brought in New York upon a personal judgment recovered in Massachusetts. The defendant in that judgment was not served with process; and the suit was commenced by the attachment of a bedstead belonging to the defendant, accompanied with a summons to appear, served on his wife after she had left her place in Massachusetts. The court held that the attachment bound only the property attached as a proceeding *in rem*, and that it could not bind the defendant, observing, that to bind a defendant personally, when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice, repeating the language in that respect of Chief Justice De Grey, used in the case of *Fisher v. Lane*, 3 Wils. 297, in 1772. See also *Borden v. Fitch*, 15 Johns. (N. Y.) 121, and the cases there cited, and *Harris v. Hardeman et al.*, 14 How. 334. To the same purport decisions are found in all the State courts. In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the State. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within

<sup>1</sup> *Acc.* *Freeman v. Alderson*, 119 U. S. 185; *McVicar v. Beedy*, 31 Me. 314; *Eliot v. McCormick*, 144 Mass. 10; *Arndt v. Arndt*, 15 Ohio, 33; *Jones v. Spencer*, 15 Wis. 583. See *Melhop v. Doane*, 31 Ia. 397.—ED.



the State where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered. *Smith v. McCutchen*, 38 Mo. 415; *Darrance v. Preston*, 18 Iowa, 396; *Hakes v. Shupe*, 27 id. 465; *Mitchell's Administrator v. Gray*, 18 Ind. 123.

Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein: in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his *Treatise on Constitutional Limitations*, 405,

for any other purpose than to subject the property of a non-resident to valid claims against him in the State, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned.

It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the State creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. *Nations et al. v. Johnson et al.*, 24 How. 195.

It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bish. Marr. and Div., sect. 156.

Neither do we mean to assert that a State may not require a non-

resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in *Vallee v. Dumergue*, 4 Exch. 290, "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them." See also *The Lafayette Insurance Co. v. French et al.*, 18 How. 404, and *Gillespie v. Commercial Mutual Marine Insurance Co.*, 12 Gray (Mass.), 201. Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. *Copin v. Adamson*, Law Rep. 9 Ex. 345.

In the present case there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

*Judgment affirmed.*

HUNT, J., dissenting. I am compelled to dissent from the opinion and judgment of the court, and, deeming the question involved to be important, I take leave to record my views upon it. . . .

It is said that the case where a preliminary seizure has been made, and jurisdiction thereby conferred, differs from that where the property is seized at the end of the action, in this: In the first case, the property is supposed to be so near to its owner, that, if seizure is made of it, he will be aware of the fact, and have his opportunity to defend, and jurisdiction of the person is thus obtained. This, however, is matter of discretion and of judgment only. Such seizure is not in itself notice to the defendant, and it is not certain that he will by that means receive notice. Adopted as a means of communicating it, and although a very good means, it is not the only one, nor necessarily better than a publication of the pendency of the suit, made with an honest intention

to reach the debtor. Who shall assume to say to the legislature, that if it authorizes a particular mode of giving notice to a debtor, its action may be sustained, but if it adopts any or all others, its action is unconstitutional and void? The rule is universal, that modes, means, questions of expediency or necessity, are exclusively within the judgment of the legislature, and that the judiciary cannot review them. This has been so held in relation to a bank of the United States, to the legal-tender act, and to cases arising under other provisions of the Constitution.

In *Jarvis v. Barrett*, 14 Wis. 591, such is the holding. The court say:—

“The essential fact on which the publication is made to depend is property of the defendant in the State, and not whether it has been attached. . . . There is no magic about the writ [of attachment] which should make it the exclusive remedy. The same legislative power which devised it can devise some other, and declare that it shall have the same force and effect. The particular means to be used are always within the control of the legislature, so that the end be not beyond the scope of legislative power.”

If the legislature shall think that publication and deposit in the post-office are likely to give the notice, there seems to be nothing in the nature of things to prevent their adoption in lieu of the attachment. The point of power cannot be thus controlled.

That a State can subject land within its limits belonging to non-resident owners to debts due to its own citizens as it can legislate upon all other local matters; that it can prescribe the mode and process by which it is to be reached,—seems to me very plain.

I am not willing to declare that a sovereign State cannot subject the land within its limits to the payment of debts due to its citizens, or that the power to do so depends upon the fact whether its statute shall authorize the property to be levied upon at the commencement of the suit or at its termination. This is a matter of detail; and I am of opinion that if reasonable notice be given, with an opportunity to defend when appearance is made, the question of power will be fully satisfied.

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### WOODRUFF v. TAYLOR.

SUPREME COURT OF VERMONT. 1847.

[*Reported 20 Vermont, 65.*]

TRESPASS for taking certain personal property. The defendant pleaded the general issue, and also pleaded two pleas in bar; which were, in substance, that he commenced a suit against one Phelps Smith in the Court of King's Bench in the District of Montreal, in Lower Canada, and caused his process to be served by arresting the

body of Smith; that in October, 1842, he recovered judgment against Smith, in the suit for £26 15s. 9d., debt, and £56 4s. 2d., costs; that in June, 1843, he took out a writ of  *fieri facias*, upon the judgment, against the goods of Smith, and placed the same in the hands of the sheriff's bailiff for service; that on the 13th of June, 1843, the goods described in the plaintiff's declaration being in the possession of Smith at Stanbridge in Lower Canada, the defendant turned them out to the bailiff, in the presence of one Hoyle, *Recors*, and the bailiff levied on the same as the property of Smith; that, after giving public notice of the time and place of sale, at the doors of two churches, on Sunday, June 18, and by posting up notices of the sale at the doors of the churches, the bailiff, on the 26th of June, sold the property, in the presence of the said *Recors* and others, to the highest bidder for £32 1s. 3d.; that at the October Term of the Court of King's Bench the sheriff returned the *fi. fu.* into court, together with the money received thereon, excepting £8 2s. 1d. for the bailiff's costs; that then one Johnson appeared in court and claimed to be a creditor of Smith and demanded a ratable division, with the other creditors of Smith, of the money paid into court, that thereupon the court ordered the money in court to be distributed as follows, — to the crier and tipstaff £5 1s. 6d., to Taylor, the plaintiff in that suit and defendant here, £11 5s. 5d., and to Johnson £7 11s. 7d., — being the whole of the proceeds of the sale, that had been paid into court; and that the said judgment still remains in full force. And the defendant averred that during the time of all these proceedings, and until the time of pleading, there was a custom and law of the said province of Lower Canada, that the proceeds of the sale of goods so levied upon should be distributed, in manner aforesaid, among creditors appearing in court and claiming distribution, and farther, that by the custom and law of said province all persons having claim in any way or manner to the property so levied upon and sold on execution, are permitted to enter their appearance in court, when the proceeds of the sale are returned, "and if any person having such claim, neglect to enter his said appearance and make and prosecute his said claim, judgment of distribution is to be made by the court of the money so paid in, in manner and form aforesaid, and the said judgment for debt, or damages, and costs and the final distribution, as aforesaid, is conclusive, both as to the title of said goods and the amount of said damages and costs, and that the same is a bar, against all persons, to any and all actions founded upon any title, interest, claim, or possession in or to such goods." To this plea the plaintiff replied, alleging that the property in the goods was in himself, and not in Phelps Smith, and averring that, during all the period of said proceedings, he was a citizen and resident of the United States, and not a resident or citizen of Canada, nor subject to the laws of that province, and that he had no notice of such proceedings, or any of them. To this replication the defendant de-

murred. The county court adjudged the replication insufficient, and rendered judgment for the defendant. Exceptions by plaintiff.<sup>1</sup>

HALL, J. A second argument having been directed in this case, it has perhaps assumed an importance in the eyes of counsel, which its intrinsic difficulties may not seem to warrant; but which may, nevertheless, justify a more extended opinion than would otherwise have been deemed necessary.

The question raised by the pleadings is, what is to be the effect of the proceedings in the King's Bench in Canada upon one not personally amenable to its tribunal, — when those proceedings are used here, in another and foreign jurisdiction? It is insisted, in behalf of the defendant, that the record pleaded, in connection with the custom and law of Canada set forth in the plea, is to be considered as conclusive evidence, that the matter now in controversy between the plaintiff and defendant has been adjudicated by a competent tribunal, and that therefore the plea is a good bar to the action. This renders it necessary to inquire into the nature of those proceedings, in reference to their sufficiency to constitute a record of estoppel.

Judgments, in regard to their conclusive effects as estoppels, are of two classes; — judgments *in personam* and judgments *in rem*. The judgment pleaded in this case cannot be supported as a judgment *in personam*, because the court rendering it had no jurisdiction of the person of the plaintiff, he being a citizen of another government and having no notice of the suit. As a proceeding against his person, the judgment was *coram non judice*, a mere nullity. This is too plain to need argument, and is, indeed, conceded by the counsel for the defendant, who insist that it is an estoppel as a proceeding *in rem*, — that although not binding on the person, it is binding on the property in controversy and concludes its title. A judgment *in rem* I understand to be an adjudication, pronounced upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is, in form as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself. It is binding only upon the parties appearing to be such by the record and those claiming by them. A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself, whose state, or condition, is to be determined. It is a proceeding to determine the state, or condition, of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be.

The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this State. The proceeding is, in form and

<sup>1</sup> Arguments of counsel are omitted. — Ed.

substance, upon the will itself. No process is issued against any one; but all persons interested in determining the state, or condition, of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money, or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the status of the subject-matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this State is concerned), just what the judgment declares it to be. This is one instance of a proceeding upon a written instrument, to determine its state, or condition; and that determination, in its consequences, involves and incidentally determines the rights of individuals to property affected by it.

But proceedings *in rem* may be and often are upon personal chattels, directly declaring the right to them. In such cases the proceeding is for the supposed violation by the property, so to speak, of some public or municipal law, or regulation, by which it is alleged the title of the former owner has become divested. The property being seized, a proceeding is then instituted against it, upon an allegation stating the cause for which it has become forfeited; upon which public notice is given, in some prescribed form, to all persons to appear and contest the allegation. It is by no means certain, that all persons having an interest in the property have actual notice of the proceeding; but if the thing itself, upon which the proceeding is had, be within the jurisdiction of the court, all persons interested are held to have constructive notice; and the sentence, or decree, of the court, declaring the state, or condition, of the property, is held to be conclusive upon all the world. A sale of the property, under such sentence, passes the right absolutely; and farther, in the case of judgments of courts of admiralty, they are also held to be conclusive evidence of the facts stated in the decree to have been found by the court, as the basis of the decree. And perhaps the judgments of municipal courts, acting *in rem*, within the sphere of their jurisdiction, would have the same effect.

These proceedings that have been mentioned are purely *in rem*. But, besides these, there is another class of cases, which may perhaps be considered, to some extent, proceedings *in rem*, though in form they are proceedings *inter partes*. An attachment of property in this State, where the court has jurisdiction of the property, but not of the person of the defendant, and a sale of it (or a levy upon it, if it be real estate), on execution, is in the nature of a proceeding *in rem*. The judgment, if the defendant have no notice, would be treated as a nullity out of our jurisdiction, so far as the person of the defendant was concerned; though it would be held binding, as between the parties, so far as regarded the property, as a pro-

ceeding *in rem*. The defendant would not, I apprehend, be allowed to recover back his property in another jurisdiction. The status of the property, as between the plaintiff and defendant, would be held to have been determined by the proceeding. But the proceeding would not in any way affect the status of the property as to any other persons than the parties to the record and those claiming by them.

Our proceeding of foreign attachment partakes, perhaps still more, of the nature of a proceeding *in rem*; but its operation as such is also of a limited character. The suit is *inter partes*, and, as a proceeding *in rem*, it must be confined to such parties. A process is issued in favor of a plaintiff, declaring against his debtor residing in another government, and alleging, also, that another person here, named in the process and styled a trustee, has goods in his hands belonging to the plaintiff's debtor, or is indebted to him, and praying that the goods or debt found here may be declared forfeited to the plaintiff, or, in other words, that the property here may be applied in payment of the plaintiff's demand. I conceive the court here has jurisdiction of the property in the hands of the trustee, or the debt due from him, — it being found in our jurisdiction, — and that the court may proceed upon it *in rem*. After publication, by which the debtor is constructively notified of the proceeding against his property, the court adjudicates upon the property and declares that it shall be delivered, or paid, to the plaintiff, to be applied upon his debt. I think such adjudication changes the status of the property, or debt, and deprives the principal debtor of all title to it; that such adjudication should be held binding and conclusive upon all the parties to the proceeding; that the foreign creditor of the trustee, having placed his property, or his credit, within this jurisdiction, should be bound by its forfeiture, declared by our courts; and that he should be barred, in any other jurisdiction, from prosecuting his claim against the trustee. But the operation of this proceeding *in rem* must be limited to the parties to it, and cannot in any manner affect the right or interest of any other person, having an independent and adverse claim to the goods, or debt, which was the subject-matter of the suit. The court does not pretend to notify such adverse claimant, either constructively, or otherwise; nor does the proceeding profess to determine the rights of any other persons than those who are parties of record to it; and it can, consequently, affect the rights of no other persons.

The distinction between proceedings purely *in rem* and those of a limited character, which have been mentioned, I think is strongly and plainly marked. The object and purpose of a proceeding purely *in rem* is to ascertain the right of every possible claimant; and it is instituted on an allegation, that the title of the former owner, whoever he may be, has become divested; and notice of the proceeding is given to the whole world to appear and make claim to it. From



the nature of the case the notice is constructive, only, as to the greater part of the world; but it is such as the law presumes will be most likely to reach the persons interested, and such as does, in point of fact, generally reach them. In the case of a seizure for the violation of our revenue laws, the substance of the libel, which states the ground on which the forfeiture is claimed, with the order of the court thereon, specifying the time and place of trial, is to be published in a newspaper, and posted up a certain number of days; and proclamation is also made in court for all persons interested to appear and contest the forfeiture. And in every court and in all countries, whose judgments are respected, notice of some kind is given. It is, indeed, as I apprehend, just as essential to the validity of a judgment *in rem*, that constructive notice, at least, should appear to have been given, as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property where no notice, actual or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court. *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 607.

The limited proceedings *in rem*, before mentioned, are not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit; no notice is sought to be given to any other persons; and the judgment being only as to the status of the property as between the parties of record, it is, as to all others persons, a mere nullity.

If we apply these principles to the record pleaded in bar in this case, I think it will be impossible to maintain that, as to the plaintiff Woodruff, it was a proceeding *in rem*. There was no allegation that the status of the property, levied upon as the property of Phelps Smith, or the avails of it, when paid into court, was to be adjudicated as to him, and there was no notice, actual or constructive, to him to appear and make any claim to it. The judgment was rendered in a suit *inter partes*, in which Taylor was plaintiff and Phelps Smith defendant; and though it bound the property as between them, it could affect the rights of no other person. It is precisely the case of a levy of an execution, in this State, upon personal property, as that of the judgment debtor, of which property some third person claims to be the owner. If such third person were to bring trespass against the judgment creditor for making the levy, I do not perceive why such creditor, with the same propriety as the defendant in this case, might not plead his levy and sale in bar as a proceeding *in rem*. The record in this case, indeed, shows that the levy was made in the presence of a *Recors*, which a levy in this State would not; but I apprehend the high standing or official character of the witnesses to a trespass would not purge its illegality, or bar a right of recovery.

But the record of the judgment in the King's Bench wholly fails to show that the right of the plaintiff in this suit to the property was attempted to be adjudicated; and there is no averment in the plea that it was adjudicated. The plea states, in substance, that, by the law of Canada, it would have been adjudicated if the plaintiff had appeared in the court and made claim to the property. And by the facts set forth in the plea we are given clearly to understand that it was not adjudicated, because the plaintiff did not so make his claim. It would therefore be impossible to maintain this plea, as furnishing evidence that the matter in controversy is *res adjudicata*, even if the plaintiff had had notice of the proceeding. If the plea could, under such circumstances, be sustained, even in the courts of Canada, it would not be because the matter had been adjudicated, but because the plaintiff, having neglected to have his claim adjudicated at the time and in the manner pointed out by the laws of that province, was thereby barred of any other remedy. The plea does not aver that the property of the plaintiff, being found in the possession of Phelps Smith, in Canada, might for that reason, or for any other reason, be legally levied upon and sold as the property of Smith. It in effect admits that the original levy upon the plaintiff's property was wrongful, but proceeds upon the ground that, by reason of the subsequent proceedings, the wrong cannot now be redressed. The original right of action of the plaintiff is conceded, but it is insisted that, by something arising *ex post facto*, his remedy is gone. It is not a bar to the right that is relied upon, but a bar to the redress. This ground of defence would therefore seem to rest upon a local law of the province of Canada, which affects the plaintiff's remedy only, but which, by the well-settled doctrine of the common law, can be of no avail when a remedy is sought in another jurisdiction.

But it is unnecessary to consider farther what might have been the effect of the defendant's plea, if the plaintiff, at the time, had been a resident of Canada; because it seems quite clear that it can have no effect whatever upon the cause of action of one who was, during the whole proceeding, a resident citizen of another government, not subject to the law of the province, and who had no notice of the proceeding. Story's Confl. of Laws, 487.

The result is, that the judgment of the county court is reversed, the replication is held sufficient, and the case is remanded to the county court for the trial of the issue of fact.<sup>1</sup>

<sup>1</sup> *Acc.* Putnam v. McDougall, 47 Vt. 478.—ED.

SUTHERLAND v. SECOND NATIONAL BANK OF PEORIA.

COURT OF APPEALS, KENTUCKY. 1880.

[Reported 78 Kentucky, 250.]

COFER, J. January 2, 1879, the appellant brought this suit in the Louisville Chancery Court against S. C. Bartlett & Co., non-residents of the State, and sued out an attachment against their property. The order of attachment was executed on that day on the Ohio and Mississippi Railway Company by delivering a copy thereof to its agent in the city of Louisville, and by summoning the company as a garnishee, but without giving to the company a notice specifying the property attached. January 4 an alias attachment was issued and placed in the hands of the marshal, who, on the 8th, levied it on one car-load of oats in the possession of the Ohio and Mississippi Railway Company. The marshal took the oats into his possession, and it was subsequently sold under order of the court. Subsequently the appellee filed its petition, claiming that it had a lien on the oats.

The pleadings and evidence disclose the following facts :—

December 24, 1878, S. C. Bartlett & Co. delivered a car-load of oats to the Peoria, Pekin, and Jacksonville Railroad Company, at Peoria, Illinois, consigned to the appellant at Louisville, and took from the Railroad Company a through bill of lading. They then drew upon the appellant against the shipment, and he declined to honor the draft. Being informed of that fact by telegraph, Bartlett & Co. caused the oats to be stopped *in transitu* on the second day of January, and on that day surrendered to the railroad company the bill of lading, and took another, consigning the oats to "S. C. Bartlett & Co., notify Verhoff & Strater, Louisville, Ky." They then drew on Verhoff & Strater, and attaching the bill of lading to the draft, on the third of January sold the draft to the appellee, who had no notice of the attachment of the appellant at Louisville.

The appellee transmitted the draft to Louisville, but Verhoff & Strater refused to honor it, assigning as a reason that the oats had been attached, and they did not wish to become involved in the controversy.

Upon these facts the court below adjudged in favor of the appellee, but allowed the marshal's costs for selling the oats to be deducted from the proceeds, and refused to render judgment against the appellant on a counter-claim for damages for the illegal seizure of the oats. From that judgment both parties appeal.

Counsel for the appellant contend that, at the time the second bill of lading was issued, the oats had passed out of the possession of the Peoria, Pekin and Jacksonville Railroad Company into the possession of the Ohio and Mississippi Company, and therefore the new bill of lading was invalid and ineffectual to invest the bank with a valid lien on the oats.

As authority in support of this position, counsel cites that class of cases in which it has been held that a bill of lading signed by the master of a vessel before receiving the possession of the goods does not bind the owners.

Those cases are not analogous to this. The oats had been received by the railroad company to be forwarded to Louisville, and was in the custody of the Ohio and Mississippi Company when the new bill was signed. The possession of the latter company was held under and by virtue of the contract of affreightment made with the Peoria, Pekin and Jacksonville Company, and the consignors had the same right to change the destination of the oats while *in transitu* that they would have had if the company receiving the oats from them had had a continuous line to Louisville. There is no question here between the consignor or consignee and the carrier, and no reason is perceived why the new bill of lading is not valid when called in question between a *bona fide* holder and one claiming a lien on account of an attachment against the goods of the consignor.

The bill of lading authorized the holder to demand the oats from the carrier, and, being a recognized symbol, its delivery to the bank was a symbolic delivery of the oats, and constituted a valid pledge.

But it is contended that the service of the first order of attachment on the Ohio and Mississippi Railway Company created a lien on the oats then in its possession, and as that service was prior in time to the pledging of the oats by the delivery of the bill of lading to the bank, the appellant has the eldest and superior lien.

At the time the first order of attachment was served, S. C. Bartlett & Co. were non-residents of the State, and the oats was in the State of Illinois. No personal service could be had upon the defendants, nor could the goods be seized under the order of attachment. The consignors still had the right to stop the oats *in transitu*, or to alter its destination; and, in our opinion, the service of the attachment on the railway company while the oats was beyond the limits of this State created no lien. True, the Ohio and Mississippi Railway Company was within the jurisdiction of the court, but the property sought to be reached was without its jurisdiction and the laws of the State, and the process of the courts here could not reach it nor compel the carrier to bring it hither; and as the court would have had no power to subject the property unless brought within its jurisdiction, its process could not create a lien upon it until it came within the county where the order of attachment was in the hands of the officer.

Counsel cite the case of *Childs v. Digby* (24 Penn. St. 23), in support of a contrary conclusion, but that case was overruled in *Pennsylvania Railroad Company v. Rennock* (51 Penn. St. 244).

The alias order of attachment, issued on the fourth of January, was in the officer's hands when the oats arrived in Louisville on the 6th, and was levied on the 8th, and created a valid lien, subject, however, to the prior lien of the bank.

It results from this conclusion that the seizure of the oats under the attachment was wrongful, and as the proceeds were not sufficient to pay the debt for which the bank had a lien, the court erred in allowing the marshal's fee to be retained out of the price. He made the seizure and sale at appellant's instance, and must look to him for his costs.

The bank had no right to set up a counter-claim in this case for the damages resulting from the seizure of the oats; but as the judgment dismissing the counter-claim absolutely will be a bar to a suit to recover such damages, the judgment must be reversed on the cross-appeal, and the cause is remanded, with directions to cause the whole proceeds of the sale to be paid over to the bank, and to dismiss the counter-claim without prejudice.<sup>1</sup>

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## MAHR *v.* NORWICH UNION FIRE INSURANCE SOCIETY.

COURT OF APPEALS OF NEW YORK. 1891.

[*Reported 127 New York, 452.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made July 9, 1889, which affirmed a judgment in favor of plaintiffs, entered upon the decision of the court on trial at Special Term.

This was an action by the plaintiffs, claiming to be the equitable owners of a policy of fire insurance, to restrain the insurer from paying the amount of a loss to the insured or to his alleged assignee.

On the 21st of April, 1886, the Norwich Union Fire Insurance Society, a corporation organized under the laws of Great Britain, with agencies in New York, Iowa, and other States, issued the policy in question to one Bartlett on his stock of goods at Muscatine, Iowa. The policy was countersigned by the agent of the company at that place. Three days later Bartlett, who resided at Muscatine, sent the policy by mail to the plaintiffs, who resided in the city of New York, as collateral security to a loan of \$2,000 concurrently made to him by them. The policy, as written, was payable to Bartlett only, and it was never assigned to the plaintiffs. July 3, 1886, the property insured was destroyed by fire, and on the sixteenth of August following Bartlett made an absolute assignment of the policy to one Kelly of Muscatine aforesaid.

This action was commenced against the insurance company and Bartlett by the due service of process in this State upon the former,

<sup>1</sup> *Acc. Western R. R. v. Thornton*, 60 Ga. 300; *Montrose Pickle Co. v. Dodson*, 76 Ia. 172, 40 N. W. 705; *Wheat v. P. C. & F. D. R. R.*, 4 Kan. 370; *Clark v. Brewer*, 6 Gray, 320; *Bates v. Ry.*, 60 Wis. 296, 19 N. W. 72. And see *Noble v. Thompson Oil Co.*, 79 Pa. 369. — Ed.

August 12, 1886, and on the latter about one month later. The company answered, alleging, among other defences, a defect of parties defendant, in that said Kelly, although a necessary party to the action, had not been joined. March 12, 1887, Kelly commenced an action at law in a court of the State of Iowa to recover from the insurance company the sum of \$2,000, the amount of the policy, with interest from July 3, 1886. March 15, 1887, on motion of the company, an order was made by the Supreme Court of this State in this action requiring said Kelly to be made a defendant therein, and that he be brought into court by a supplemental summons. A supplemental summons and complaint were issued accordingly, and the same were served on Kelly in the State of Iowa pursuant to an order of publication based upon an affidavit alleging that "the defendant S. G. Kelly claims to have property in the State of New York, to wit, an interest in the insurance policy" in question. No service was made upon Kelly within this State, and he did not appear in the action. The insurance company, by its answer to the supplemental complaint, pleaded the pendency of the action in the Iowa court; that Kelly was a necessary party, and that the Supreme Court had by its order directed that he be brought in as a party defendant, and demanded judgment that the complaint be dismissed "unless said S. G. Kelly be brought in so as to be bound by any judgment herein."

These facts appeared upon the trial of this action, where Kelly's default was noted, and were in substance found by the trial judge, who also found that Kelly had no interest in the policy "superior to that of the plaintiffs; . . . and that the alleged assignment . . . by the defendant Bartlett to said S. G. Kelly, of the date August 16, 1886, . . . was void, and in no wise affected the prior interest obtained by the plaintiffs in said policy on or about the 24th day of April, 1886."

Judgment was directed restraining the insurance company from paying any money under said policy to Bartlett or Kelly, and although there was neither allegation nor evidence of any proof of loss as required by the terms of the policy, the defendant company was ordered "to pay to the plaintiffs such moneys as shall be found to be payable under and by virtue of" said policy of insurance.

VANN, J. Upon the argument of this appeal the learned counsel for the plaintiff, with great fairness, admitted that the Supreme Court never acquired jurisdiction over Kelly, the alleged assignee of the insurance policy that is the subject of this action. The main question left for decision is whether Kelly was a necessary party, as the defendant company alleged in its answers and urged upon the trial. It is not claimed that he should have been joined as a plaintiff, but his presence as a defendant is insisted upon as essential to "the complete determination or settlement" of the questions involved. The Code of Civil Procedure provides that "the court may determine

the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in." Code Civ. Pro. § 452. While the statute does not in terms prohibit the court from determining the controversy, unless all the necessary parties are brought in, that is impliedly commanded and is the established practice in all equitable actions. *Peyser v. Wendt*, 87 N. Y. 322; *Sherman v. Parish*, 53 id. 483; *Webster v. Bond*, 9 Hun, 437; *Shaver v. Brainard*, 29 Barb. 25; *Sturtevant v. Caldwell*, 4 Bosw. 628; *Van Epps v. Van Deusen*, 4 Paige, 64.

It is not enough for the court to direct that the necessary parties be brought in, but it should refuse to proceed to a determination of the controversy, so as to affect their rights until they are in fact brought in. *Peyser v. Wendt*, *supra*; *Sherman v. Parish*, *supra*; *Powell v. Finch*, 5 Duer, 666.

The plaintiffs did not appeal from the order of the court requiring Kelly to be brought in and as long as it remained in force it was an adjudication, establishing as the practice, if not the law, of the case that Kelly was a necessary party. *Riggs v. Pursell*, 74 N. Y. 370.

Moreover, the object of this action was to establish the equitable title of the plaintiffs to the policy and to prevent the company from paying the proceeds to any one except themselves. The proceeds, however, were also claimed by Kelly, who not only held the legal title to the policy, but had actually commenced an action upon it against the company in another State. Clearly, the company should not be required to pay the entire amount of the policy both to the plaintiffs and to Kelly, or, without fault on its part, to be placed in a position where it would run any reasonable risk of being compelled to make a double payment. But, how is such a result to be prevented when an action at law, brought by the legal owner to compel the company to pay the amount of the policy to him, is pending in one State, and an action in equity by the equitable owner to prevent such payment, is pending in another State, unless all interested persons are parties to the latter? Could the Court of Equity safely proceed to judgment against the company, unless the legal owner was before it as a party? If it should enjoin the company from making payment to any one except the equitable owner, it could not prevent the legal owner from prosecuting his action to collection in the other jurisdiction. It could not enjoin a person over whom it had no jurisdiction, nor make any decree affecting his rights.

The general rule in equity requires that all persons interested in the subject of the action should be made parties, in order to prevent a multiplicity of suits and secure a final determination of their rights. *Osterhoudt v. Supervisors*, 98 N. Y. 239; *Derham v. Lee*, 87 id. 599.

There is an essential difference between the practice at law and in

equity in determining who are proper and necessary parties. Story, in his work on Equity Pleadings (§ 72), says that two general principles control courts of equity in this respect: 1. That the rights of no man shall be finally decided unless he himself is present, or at least has had a full opportunity to appear and vindicate his rights; 2. That when a decision is made upon any particular subject-matter, the rights of all persons whose interests are immediately connected with that decision and affected by it, shall be provided for as far as they reasonably may be. The learned author adds: "It is the constant aim of courts of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also, that future litigation may be prevented." As Lord Hardwicke once said, all persons ought to be made parties who are necessary to make the determination complete and to quiet the question. *Poore v. Clark*, 2 Atk. 515. Not only all persons whose rights may be affected by the judgment should be brought into court, but all whose presence is essential to the protection of any party to the action. *Gray v. Schenck*, 4 N. Y. 460; *Russell v. Clark*, 7 Cranch, 69, 98; *Picquet v. Swan*, 5 Mason, 561; *Fell v. Brown*, 2 Brown's Ch. 218.

The burden is on the plaintiff to secure the presence of all such persons, and it is his misfortune if he is unable to do so.

When there are conflicting claimants to the same obligation, each insisting upon it as exclusively his own, all should be made parties before the question of title is determined by a court of equity in favor of either against the one from whom the obligation is due. Otherwise payment or performance may be exacted as many times as there are separate claimants. It follows that the title to a chose in action, such as the policy in question, cannot be settled unless all those who claim any interest therein, whether legal or equitable, are joined as parties, plaintiff or defendant. As it is conceded that Kelly, although nominally, is not really a party to the action, he has not had his day in court, and the decree in favor of the plaintiff being void as to him on that account, is powerless to affect his rights or to afford protection to the defendant company in obeying its command. The absence of jurisdiction over a party is the absence of power to render judgment against that party. While the court assumed to pronounce judgment against Kelly and to restrain him from receiving the money due upon the policy and from suing for its recovery, its action in that regard was *coram non jndice* and void as to him. It could not exercise judicial power over one who was not subject to its jurisdiction, nor compel him to obey a decree that was rendered without due process of law. While its command to the company not to pay Kelly could be enforced by punishment for disobedience, its command to Kelly not to sue the company could not be enforced by punishment or otherwise, because it was made without authority.



Hence Kelly could compel the company to do what the judgment prohibited it from doing. Aside from the question of power to proceed without jurisdiction over Kelly, such a judgment is unreasonable and hence inequitable. A court of equity should not restrain a party from doing an act, when it has no power to protect that party from being compelled by another court of competent jurisdiction to do the act thus prohibited. A forcible illustration of this appears in a case recently reported, which lacks no element of complete analogy, as it was the judgment of the court of last resort in Iowa in the action brought by Kelly against the defendant company and set forth in its answer in this action. *Kelly v. Norwich Union Fire Ins. Co.*, 47 N. W. Rep. 986, 79 Iowa R. 425.

While the judgment in that case is not before us as evidence, the reported decision therein is just as valuable to illustrate what might reasonably be expected to take place as if it were officially known to us as a record of what had taken place. That learned court, in affirming a recovery by Kelly upon the policy in question for its whole amount, said: "The record of the New York court was rightly rejected for the reason that, as against Kelly, the party claiming in this case to hold the policy and all rights under it, the decree and proceeding are void for the reason that he was not served with process subjecting him to the jurisdiction of the New York court. Kelly was served with process in this State and did not appear in the case. The New York court failed to acquire jurisdiction of his person by service of process in this State. The judgment, therefore, as to him is void."

We regard the case cited as a practical demonstration that Kelly is a necessary party to this action and that a court of equity should not have proceeded to judgment against the company without first acquiring jurisdiction over him. If this were an action at law brought by the plaintiffs to recover upon the policy, a different question would be presented, involving a conflict between the courts of New York and Iowa. As it is an action in equity, however, it is not necessary for us to now consider that subject.

Having in view our form of government, the comity due from the courts of one State to those of another and the necessity for freedom of commercial transactions between citizens of different States, such questions should not be hastily entertained, but should be avoided when the rights of parties can be satisfactorily determined upon other grounds. Story on Conflict of Laws, § 9.

We think that further argument is not required to show that Kelly was a necessary party to this action and that the trial court erred in rendering the judgment appealed from without first acquiring jurisdiction over him.

The judgment should, therefore, be reversed, and a new trial granted, with costs to abide event.

All concur.

*Judgment reversed.*

RENIER *v.* HURLBUT.

SUPREME COURT OF WISCONSIN. 1891.

[Reported 81 Wis. 24.]

CASSODAY, J. It appears from the record that September 26, 1888, the plaintiff recovered judgment upon a policy of insurance in the Circuit Court for Brown County against the Dwelling-House Insurance Company, a corporation created and organized under the laws of Massachusetts, and having its principal place of business at Boston, by reason of loss by fire of a dwelling-house, barns, and property therein, for \$3,416.76; that the said Boston company appealed from said judgment to this court, and upon such appeal the defendants, Hurlbut and Boaler, executed an undertaking to the plaintiff, wherein and whereby they agreed and undertook, pursuant to the statute, that they would pay all costs which might be awarded against said Boston company on said appeal, not exceeding \$250, and also undertook that, in case said judgment should be affirmed, they would pay the amount thereof; that said judgment was affirmed on said appeal, April 25, 1889 (74 Wis. 89, 42 N. W. Rep. 208); that the *remittitur* thereon was not filed in the trial court until November 18, 1889; that August 1, 1890, this action was commenced, upon said undertaking, against said Hurlbut and Boaler; that the defendants herein answered, and admitted all the allegations of the complaint, and, in effect, alleged that June 28, 1889, the Saint Paul Fire & Marine Insurance Company, created and organized under the laws of Minnesota, commenced an action in the Superior Court for Cook County, in the State of Illinois, against this plaintiff, on a claim for \$2,256, and in said action served garnishee process upon the said Boston company's agent at Chicago; that the process in said last-named action against this plaintiff was made returnable November 4, 1889, and was served only by the publication of notice for three successive weeks, commencing October 22, 1889, and ending November 5, 1889, and mailing copies thereof, etc., to the plaintiff in Wisconsin, where she resided during all the times mentioned; that upon the trial of said action the court found, in effect, the facts stated; and also that the said Boston company had not paid the plaintiff anything on said judgment, except \$1,200, paid thereon July 1, 1889; that this plaintiff had not been personally served with summons or other process in the proceedings in the Superior Court of Cook County, and had not appeared in said proceedings; that the judgment so recovered in said Brown County was exempt from seizure on attachment or execution, under the laws of Wisconsin, during all the time mentioned, but was not exempt under the laws of Illinois; and, as a conclusion of law, that the defendants were entitled to judgment against the plaintiff, abating this action. From the judgment entered thereon accordingly the plaintiff brings this appeal.

During all the times mentioned in the foregoing statement the plaintiff, Mrs. Renier, was domiciled in and a resident of this State. The St. Paul company mentioned, claiming to be a creditor of hers for a large amount, commenced an action against her, not in any of the courts of Wisconsin but in the Superior Court for Cook County, Ill., and garnished the Boston company, as a foreign corporation, by serving garnishee process upon its agent located in Chicago. Mrs. Renier did not appear in that action, nor in such garnishee proceedings, and no process or notice of any kind was ever served upon her therein otherwise than by publication, as mentioned. It is claimed that such publication was insufficient, but for the purpose of this appeal, it is assumed that the statutes of Illinois were in all respects complied with. Upon the facts stated the law is well settled by the Supreme Court of the United States to the effect that the Chicago court obtained no jurisdiction to render any personal judgment against Mrs. Renier. *St. Clair v. Cox*, 106 U. S. 350; *Pennoyer v. Neff*, 95 U. S. 714; *Thompson v. Whitman*, 18 Wall. 457; *Public Works v. Columbia College*, 17 Wall. 521. To the same effect are the decisions of this court. *Witt v. Meyer*, 69 Wis. 595, 35 N. W. Rep. 25; *Smith v. Grady*, 68 Wis. 215, 31 N. W. Rep. 477. This being so, it is very obvious that the most that could be accomplished in the Chicago court was to reach property, assets, or credits belonging to Mrs. Renier, and within the jurisdiction of that court. This is apparent from the authorities cited. If there was, therefore, a want of jurisdiction in that court as to such property, assets, or credits, then the proceedings therein were null and void, and could not operate to abate or defeat the suit at bar. The question recurs whether, at the time of such garnishment, Mrs. Renier was the owner of any property, assets, or credits within such jurisdiction of the Chicago court. There is no pretence that at the time the garnishee papers were served upon the Chicago agent of the Boston company he had in his possession or under his control any tangible property belonging to Mrs. Renier. The extent of the claim is that at that time the Boston company was indebted to Mrs. Renier upon the judgment recovered in the Circuit Court for Brown County, mentioned in the foregoing statement, and hence that such indebtedness was attached or reached by the service of the garnishee papers upon the Boston company's agent in Chicago. If such contention can be maintained, then it is obvious that the St. Paul company might have attached such indebtedness by such garnishee proceedings in any State or city in the Union where the Boston company happened to have an office and an agent. This would necessarily be upon the theory that such indebtedness to Mrs. Renier was ambulatory, following each of the several agents of the Boston company, and, for the purposes of garnishment, having a situs with and in the office of each and all of such agents, wherever they happened to be located. If such is the law, it is certainly important that all should know it. As indicated, none of the parties to the proceedings in the Chicago court

were residents of Illinois. Proceedings by garnishment are in their nature very much like the old trustee process. In such a case in Massachusetts, at an early day, the court refused to take jurisdiction, for the reason that all the parties were non-residents. *Tingley v. Bateman*, 10 Mass. 346. It was there said, in behalf of the court, that "the summoning of a trustee is like a process *in rem*. A chose in action is thereby arrested, and made to answer the debt of the principal. The person entitled by the contract or duty of the supposed trustee is thus summoned by the arrest of this species of effects. These are, however, to be considered, for this purpose, as local, and as remaining at the residence of the debtor or person intrusted for the principal; and his rights, in this respect, are not to be considered as following the person of the debtor to any place where he may be transiently found, to be there taken at the will of a third person, within a jurisdiction where neither the original creditor nor debtor resides." To the same effect are *Sawyer v. Thompson*, 24 N. H. 510; *Bowen v. Pope*, 125 Ill. 28, 17 N. E. Rep. 64. It has also been repeatedly held in Massachusetts that a trustee residing in another State, though temporarily therein when service is made upon him, is not liable to the trustee process, and especially is this so where the principal defendant is also a non-resident. *Ray v. Underwood*, 3 Pick. 302; *Hart v. Anthony*, 15 Pick. 445; *Nye v. Liscombe*, 21 Pick. 263. To the same effect are *Lawrence v. Smith*, 45 N. H. 533; *Green v. Bank*, 25 Conn. 452; *Lovejoy v. Albee*, 33 Me. 414. The only exception to this rule seems to be where tangible property belonging to the principal defendant has been actually seized within the State, or the contract or promise is to be performed within the State. *Id.*; *Sawyer v. Thompson*, *supra*; *Young v. Ross*, 31 N. H. 201; *Lawrence v. Smith*, *supra*; *Guillander v. Howell*, 35 N. Y. 657; *Lovejoy v. Albee*, *supra*. Some of the authorities cited and the views thus expressed were considered and sustained by Mr. Justice Orton in *Commercial Nat. Bank v. Chicago, M. & St. P. Ry. Co.*, 45 Wis. 172.

The courts of Massachusetts have gone to the extent of holding that a resident of that State, having contracted to deliver goods at a place in another State, could not be charged in foreign attachment as the trustee of the person to whom the goods were thus contracted. *Clark v. Brewer*, 6 Gray, 320. In *Danforth v. Penny*, 3 Metc. (Mass.) 564, it was held that a foreign corporation, having no specific articles of property in its possession within that State belonging to the principal defendant to whom it was indebted, could not be charged by trustee process, notwithstanding many of its members and officers resided there, and its books and records were kept there. To the same effect is *Gold v. Railroad Co.*, 1 Gray, 424, where it was held that a foreign railroad corporation could not be charged by the trustee process, although in possession of a railroad in Massachusetts under leases from the proprietors thereof; and also *Towle v. Wilder*, 57 Vt. 622; *Railroad Co. v. Dooley*, 78 Ala. 524; *Railroad Co. v. Chumbey* (Ala.), 9 South. Rep. 286; *Railroad Co. v. Thornton*, 60 Ga. 300; *Bates v. Railroad Co.*,

60 Wis. 296, 19 N. W. Rep. 72; *Sutherland v. Bank*, 78 Ky. 250. In *Smith v. Life Insurance Co.*, 14 Allen, 336, it was held that the courts of Massachusetts would not entertain jurisdiction of a bill in equity, brought by a citizen of Alabama against such foreign insurance corporation, to restore him to his rights under a life policy, notwithstanding such foreign corporation transacted business therein, and had a resident agent therein, upon whom all lawful process against the company might be served. The theory upon which foreign attachments and foreign garnishments are sustained is that the principal defendant is beyond the reach of process, but that his property is within the reach of such process, and may, therefore, be seized thereon. *Railroad Co. v. Pennock*, 51 Pa. St. 244. As indicated, the proceedings in the Chicago court were not based upon any cause of action originating in the State of Illinois, nor to enforce any contract or engagement entered into with reference to any subject-matter within that State, but merely for the purpose of reaching property belonging to Mrs. Renier, having no tangible existence in that State. The authorities cited, as well as others which might be cited, pretty clearly show that the Chicago court obtained no jurisdiction over that property. *Banking Co. v. Carr*, 76 Ala. 388; *Brauser v. Insurance Co.*, 21 Wis. 506. Nor was it the purpose of such proceedings to reach property belonging to the Boston company. Its indebtedness to Mrs. Renier was in no sense its property, but rather an indication of the absence of its property. In speaking of the situs of choses in action for the purposes of taxation, Mr. Justice Field observed that "to call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due." *State Tax on Foreign-Held Bonds*, 15 Wall. 320. This principle has received recent sanction in this court. *State v. Gaylord*, 73 Wis. 325, 41 N. W. Rep. 521.

It is obvious from what has been said that, if the indebtedness of the Boston company to Mrs. Renier has any situs outside of Wisconsin for the purposes of garnishment, it was at the home office of that company in Massachusetts; certainly not with the respective agents of that company, wherever located in the several States. But, as observed, that indebtedness was in the form of a judgment recovered by Mrs. Renier in a court of her domicile in Wisconsin. The statute of this State required the Boston company to pay that judgment to Mrs. Renier within the time therein specified. Section 1974, Rev. St.<sup>1</sup> Such payment, or its equivalent, was absolutely essential to the continuance of business in the State. *Id.* Such being the rules of law,

<sup>1</sup> Section 1974 requires insurance companies to pay final judgments against them in Wisconsin within sixty days after the rendition thereof, or cease issuing policies in the State until the judgment is paid, and makes violations of the statute punishable by forfeiture.

and the facts being as stated, we must hold that the situs of the indebtedness in question for the purposes of garnishment at the time of the commencement of the proceedings in the Chicago court was only in Wisconsin, where Mrs. Renier resided. This view is sustained by numerous cases cited by counsel for the plaintiff, among which are *Wallace v. McConnell*, 13 Pet. 136; *Railroad Co. v. Gomila*, 132 U. S. 485; *Bank v. Rollin*, 99 Mass. 313; *Trowbridge v. Means*, 5 Ark. 135; *Shinn v. Zimmerman*, 23 N. J. Law, 150; *Bank v. Snow*, 9 R. I. 11; *Wood v. Lake*, 13 Wis. 84. It follows that the proceedings in the Chicago court did not operate as a bar or abatement of this action. The judgment of the Circuit Court is reversed, and the cause remanded, with direction to enter judgment in favor of the plaintiff and against the defendants for the proper amount remaining due and unpaid on the former judgment, with interest and costs.<sup>1</sup>

## LOUISVILLE AND NASHVILLE RAILROAD *v.* NASH.

SUPREME COURT OF ALABAMA. 1898.

[Reported 118 *Alabama*, 477.]

BRICKELL, C. J.<sup>2</sup> The appellee, a resident of this State, and an employé of appellant, brought this action against appellant, the Louisville & Nashville Railroad Company, a corporation organized under the laws of the State of Kentucky, and doing business in that State, and also in Alabama and Tennessee, to recover the amount of wages earned and due him for work and labor done here for appellant. In defence of the action, appellant set up the payment by it, previously to the commencement of this suit, of a judgment rendered against it in a justice's court in the State of Tennessee in an attachment suit, founded on a debt due in Tennessee, wherein appellee was defendant and appellant was summoned to answer as garnishee. Appellee was a resident of Alabama at the time of the commencement, and during the pendency, of said attachment suit, was not personally served with notice thereof, had no actual notice, and did not voluntarily appear, but service was had by publication, in accordance with the laws of Tennessee. The questions presented by this appeal are, therefore — First, whether the courts of one State have, or can acquire, jurisdiction to attach and condemn a debt due to a non-resident, and payable in the State of his residence, by service of process on his debtor as garnishee, in the absence of personal service within the State of suit on the creditor or his voluntary

<sup>1</sup> *Acc. Nat. Bank v. Furtick* (Del.), 42 Atl. 479; *Swedish-American Bank v. Bleecker*, 72 Minn. 383, 75 N. W. 740; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938; *Ranney v. Morrow*, 3 Pugs. (N. B.) 270. — Ed.

<sup>2</sup> The opinion only is given : it sufficiently states the case. — Ed.

appearance; and, second, whether, if such courts are without jurisdiction for this purpose, the payment by the garnishee of a judgment rendered against him as garnishee, under such circumstances, will constitute any defence to a subsequent suit by his creditor to recover the debt.

The case presented is ruled, with respect to both questions, by the cases of *Railroad Co. v. Dooley*, 78 Ala. 524, and *Railroad Co. v. Chumley*, 92 Ala. 317. In the former case it was held that a debt due by a foreign corporation to an employé in the State of its creation, although it was doing business in this State also, could not be subjected by a creditor in this State by attachment against the non-resident creditor and garnishment against the corporation. In the latter we decided that the payment by a railroad corporation created by the laws of this State, but doing business also in Tennessee, of a judgment rendered against it in Tennessee under a garnishment issued on a judgment recovered in that State against an employé resident in this State, was no defence to an action by the employé to recover the wages due him for work done in this State, in the absence of evidence showing that, by the statutes of Tennessee, the court had acquired jurisdiction of the debt sought to be reached and subjected. In both of the above cases it was expressly decided that the situs of a debt, for the purpose of garnishment, is at the domicile of the creditor, and not that of the debtor; and this fact is the true foundation for the proposition that a State has no jurisdiction over a debt due to a non-resident, and payable without the State of suit, in the absence of personal service on the creditor within the State, or his voluntary appearance in a proceeding in which jurisdiction over it is sought to be exercised. If it be conceded that a debt due by a resident of, or a corporation doing business in, one State to a resident in another State is not property within the State of the debtor's residence, no legislation by the latter State can give it a situs there for the purpose of enabling its citizens, or other persons resorting to its courts, to subject it to the payment of claims against the creditor by garnishing the person or corporation from whom it is due. If it has no situs within the debtor's State, in the absence of legislation, any legislation attempting to give it such situs, or to prescribe the manner of service on either the debtor or the non-resident creditor, by which jurisdiction over it may be acquired, unless by personal service on the creditor within the State, or his voluntary appearance, would be as nugatory and ineffectual to dispose of the creditor's property in the debt as would be legislation attempting to acquire jurisdiction over tangible property situated without the State. The subject-matter of such legislation, namely, the property over which it is attempted to acquire jurisdiction, is entirely beyond the power and control of the State. In the view we take of the question, the condemnation of a debt due to a non-resident, without personal service within the State of suit on the defendant, or owner of the debt,

or his voluntary appearance, is without due process of law, and it seems manifest that a State cannot make that due process of law which is not such. *Martie v. Railroad Co.*, 50 Hun, 347, 3 N. Y. Supp. 82. It is immaterial also, under this concession, whether the corporation garnishee, if the garnishee be a corporation, is one created by the laws of the State where the debt is sought to be condemned, or is a foreign corporation, doing business therein by permission of the State. The question is not one of jurisdiction over the garnishee, but one of jurisdiction over property situated without the State, and, through the seizure of such property, over the owner thereof.

The right of a State to inquire into the obligations of a non-resident, and its jurisdiction to attach his property to answer for such obligations, is founded solely on the fact that each State has exclusive control and jurisdiction over the property situated within its territorial limits, and the inquiry can be carried only to the extent necessary to control the disposition of such property. If there be no personal service on the defendant or owner of the property, or appearance by him, the jurisdiction cannot extend beyond binding the property attached or effects garnished. Consequently, if the non-resident has no property within the State, and there has been no personal service on him within the State, or voluntary appearance by him, there is nothing upon which its tribunals can adjudicate; and any judgment rendered under such circumstances, whether affecting the person only, or the property also, would be void for want of jurisdiction of the person and of the subject-matter. *Bank v. Clement*, 109 Ala. 280; *Pennoyer v. Neff*, 95 U. S. 714; *St. Clair v. Cox*, 106 U. S. 350; *Freeman v. Alderson*, 119 U. S. 185. It was held in *Pennoyer v. Neff*, *supra*, that, in a suit on a money demand against a non-resident, substituted service of process by publication is effectual only where, in connection with process against the person for the commencement of the action, property within the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching said property or affecting some interest therein; and that a judgment by default against a non-resident upon such service only, no property of the defendant within the State having been seized prior to the rendition of the judgment, was without due process of law, and void, and the title of defendant to property within the State sold under execution issued on such judgment was not divested by such sale, notwithstanding the statutes of the State of suit authorized service in this manner upon a non-resident, and attempted to protect the title of a purchaser in good faith of property sold under execution issued on such judgment. In the opinion by Mr. Justice Field it is said: "No State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the inde-



pendence of one implies the exclusion of power from all others. And so it has been laid down by jurists as an elementary principle that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'And any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding such persons or property in any other tribunal.' " This decision, involving, as it did, a construction of the fourteenth amendment of the Federal Constitution, and its effect on judgments rendered against non-residents without personal service or voluntary appearance, and without a preliminary seizure of property of the defendant within the State of suit, is binding upon, and must be followed by, the courts of the several States. It necessarily results from the principles declared therein that if the situs of a debt for the purpose of garnishment be at the domicile of the creditor, and the debt be not property within the garnishee State, any judgment rendered against the creditor, as well as any judgment the effect of which is, on its face, to discharge the debt due to the non-resident by requiring the debtor, the garnishee, to pay it to the non-resident's creditor, is without due process of law, and void, unless there was personal service on the defendant within the State or a voluntary appearance by him. It necessarily follows, also, that the payment of such judgment by the garnishee is no protection to him in a subsequent suit by his creditor to recover the debt, and that any legislation by the garnishee State attempting to acquire jurisdiction over the debt, by declaring it to be property within its limits, subject to seizure by service of process on the garnishee and service by publication on the non-resident defendant, "is a mere nullity, and incapable of binding such persons or property in any other tribunal."

Any attempt to reconcile the conflicting authorities on the question of the situs of a debt for the purpose of garnishment would be vain, but analogy, as well as reason and justice to the creditor, would seem to fix it at the domicile of the creditor, and forbid its seizure or any change in the ownership thereof, by the law or procedure of any other State. It is now well settled that a debt due by an insolvent to a non-resident is property within the creditor's State, and that no law or decree of the debtor's State discharging his debts can operate to discharge the debt due to the non-resident. *Brown v. Smart*, 145 U. S. 454; *Denny v. Bennett*, 128 U. S. 489; *Pattee v. Paige*, 163 Mass. 352; *Bank v. Batcheller*, 151 Mass. 589; *Wilson v. Matthews*, 32 Ala. 345. It is equally well settled that, for the purpose of taxation, a debt has its situs at the domicile of the creditor. *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Kirtland v. Hotchkiss*, 100 U. S. 491; *In re Bronson's Estate*, 150 N. Y. 1; *Potter v. Ross*, 23 N. J. Law, 517; *Boyd v. City of Selma*, 96 Ala.

150. In the opinion of the State Tax Case it was said: "But debts owing by a corporation, like debts owing by individuals, are not property of the debtors in any sense. They are obligations of the debtors, and only possess value in the hands of the creditors, — with them are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in the debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile, whatever they may be. Their debts can have no locality separate from the parties to whom they are due." We are unable to perceive any sound reason for giving to a debt a different situs for the purpose of garnishment, and none, satisfactory to us, has been offered by those decisions which give it a different situs for this purpose only. If a debt due to a non-resident cannot be discharged by an insolvency law or decree of the debtor's State, because of a want of jurisdiction over the creditor and the debt, a like reason should forbid its discharge by garnishment proceedings. Those courts which adhere to the contrary view are not themselves in accord as to the theory upon which they can acquire jurisdiction over such debts. In some it is held that, for the purpose of garnishment, a State has the power to fix the situs of a debt at the domicile of the debtor, although the creditor be a non-resident. *Williams v. Ingersoll*, 89 N. Y. 508; *Douglass v. Insurance Co.*, 138 N. Y. 209; *Bragg v. Gaynor*, 85 Wis. 468. As we have seen above, the exercise of such power would be a nullity in its effect upon the person of a non-resident or the debt due him. Others hold that the situs of a debt is wherever a suit may be maintained to recover it. *Harvey v. Railway Co.*, 50 Minn. 406; *Manufacturing Co. v. Lang*, 127 Mo. 242. As a general proposition, this, as we have seen, is incorrect, and, as limited and applied to garnishments only, it seems to us, merely an arbitrary distinction. Moreover, if its situs is in the State of the debtor only by reason of the fact that a suit to recover it may there be maintained, a debt due by a foreign corporation doing business in a State other than that of its creation, to a non-resident of such State, could not be reached by a garnishment sued out in the State in the absence of a statute expressly authorizing it to be sued therein on a cause of action arising without the State; for it is well settled, as a general rule, that no action *in personam* can be maintained against a foreign corporation, unless the contract sued on was made or was to be performed, or the injury complained of was suffered, in the State in which the action is brought. *Railroad Co. v. Carr*, 76 Ala. 388; *St. Clair v. Cox*, 106 U. S. 350. And it has been expressly held that a non-resident creditor of a corporation cannot have his property in a debt seized in a State to which the corporation may resort merely for the purpose of doing business through its agents, when the claim arose on a contract not to be performed within the State of suit. *Reimers v. Manufacturing Co.*,

17 C. C. A. 228, 70 Fed. 573; *Douglass v. Insurance Co.*, 138 N. Y. 209. We prefer to adhere to the principle upon which our former cases were decided, that the situs of a debt is at the domicile of the creditor, for the purpose of garnishment as well as for other purposes. *Railroad Co. v. Dooley*, 78 Ala. 524; *Railroad Co. v. Chumley*, 92 Ala. 317; *Reno, Non-res.*, § 138 *et seq.*; *Railroad Co. v. Smith*, 70 Miss. 344, and notes; *Central Trust Co. v. Chattanooga, R. & C. R. Co.*, 68 Fed. 685; *Railway Co. v. Sharitt*, 43 Kan. 375; *Renier v. Hurlbut*, 81 Wis. 24. Adhering in this respect to the situs of the debt due from appellant to appellee, we are constrained by the decisions of the Supreme Court of the United States, cited above, to hold that the judgment of the Tennessee court, operating, as it did, on its face, to condemn and divest appellee's property in the debt over which it had not acquired jurisdiction by personal service within the State on appellee, or by his voluntary appearance, was without due process of law, and absolutely void for want of jurisdiction of the *res*, the debt, or of the person of its owner. To such judgments the Constitution of the United States does not require that any faith and credit be given; the constitutional provision that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, being now construed as applicable "only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the State itself to exercise authority over the person or the subject-matter." *Pennoy v. Neff*, 95 U. S. 714, *supra*.

We find no error in the judgment of the city court and it must be affirmed.<sup>1</sup>

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CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY v.  
STURM.

SUPREME COURT OF THE UNITED STATES. 1899.

[Reported 174 *United States*, 710]

THE defendant in error brought an action against the plaintiff in error in a justices' court of Belleville, Republic County, Kansas, for the sum of \$140, for wages due. Judgment was rendered for him in the sum of \$140 and interest and costs.

The plaintiff in error appealed from the judgment to the District Court of the county, to which court all the papers were transmitted, and the case docketed for trial.

<sup>1</sup> *Acc. Central Trust Co. v. C. R. & C. R. R.*, 68 Fed. 685. — ED.

On the 10th of October, 1894, the case was called for trial, when plaintiff in error filed a motion for continuance, supported by an affidavit affirming that on the 13th day of December, 1893, in the county of Pottawattomie and State of Iowa, one A. H. Willard commenced an action against E. H. Sturm in justices' court before Oride Vien, a justice of the peace for said county, to recover the sum of \$78.63, with interest at the rate of ten per cent per annum, and at the same time sued out a writ of attachment and garnishment, and duly garnisheed the plaintiff in error, and at that time plaintiff in error was indebted to defendant in error in the sum of \$77.17 for wages, being the same wages sought to be recovered in this action;

That plaintiff in error filed its answer, admitting such indebtedness;

That at the time of the commencement of said action in Pottawattomie County the defendant was a non-resident of the State of Iowa, and that service upon him was duly made by publication, and that afterwards judgment was rendered against him and plaintiff in error as garnishee for the sum of \$76.16, and costs of suit amounting to \$19, and from such judgment appealed to the District Court of said county, where said action was then pending undetermined;

That the moneys sought to be recovered in this action are the same moneys sought to be recovered in the garnishment proceedings, and that under the laws of Iowa its courts had jurisdiction thereof, and that the said moneys were not at the time of the garnishment exempt from attachment, execution, or garnishment; that the justice of the peace at all of the times of the proceedings was a duly qualified and acting justice, and that all the proceedings were commenced prior to the commencement of the present action, and that if the case be continued until the next term of the court the action in Iowa will be determined and the rights of plaintiff in error protected.

The motion was denied, and the plaintiff in error pleaded in answer the same matters alleged in the affidavit for continuance, and attached to the answer a certified copy of the proceedings in the Iowa courts. It also alleged that it was a corporation duly organized under the laws of the States of Illinois and Iowa, doing business in the State of Kansas.

The defendant in error replied to the answer, and alleged that the amount due from plaintiff in error was for wages due for services rendered within three months next prior to the commencement of the action; that he was a resident, head of a family, and that the wages were exempt under the laws of Kansas, and not subject to garnishment proceedings; that plaintiff in error knew these facts, and that the Iowa court had no jurisdiction of his property or person.

Evidence was introduced in support of the issues, including certain sections of the laws of Iowa relating to service by publication, and to attachment and garnishment, and judgment was rendered for the defendant in error in the amount sued for.

A new trial was moved, on the ground, among others, that the

"decision is contrary to and in conflict with section 1, article IV., of the Constitution of the United States."

The motion was denied.

On error to the Court of Appeals, and from thence to the Supreme Court, the judgment was affirmed, and the case was then brought here.

The defendant in error was notified of the suit against him in Iowa and of the proceedings in garnishment in time to have protected his rights.

The errors assigned present in various ways the contention that the Supreme Court of Kansas refused to give full faith and credit to the records and judicial proceedings of the courts of the State of Iowa, in violation of section 1, article IV., of the Constitution of the United States, and of the act of Congress entitled "An act to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated so as to take effect in every other State," approved May 26, 1790.

*Mr. W. F. Evans* and *Mr. M. A. Low* for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE McKENNA, after making the foregoing statement, delivered the opinion of the court.

How proceedings in garnishment may be availed of in defence — whether in abatement or bar of the suit on the debt attached or for a continuance of it or suspension of execution — the practice of the States of the Union is not uniform. But it is obvious and necessary justice that such proceedings should be allowed as a defence in some way.

In the pending suit plaintiff in error moved for a continuance, and not securing it pleaded the proceedings in garnishment in answer. Judgment, however, was rendered against it, and sustained by the Supreme Court, on the authority of *Missouri Pacific Railway Co. v. Sharitt*, 43 Kansas, 375, and "for the reasons stated by Mr. Justice Valentine in that case."

The facts of that case were as follows: The Missouri Pacific Railway Company was indebted to Sharitt for services performed in Kansas. Sharitt was indebted to one J. P. Stewart, a resident of Missouri. Stewart sued him in Missouri, and attached his wages in the hands of the railway company, and the latter answered in the suit in accordance with the order of garnishment on the 28th of July, 1887, admitting indebtedness, and on the 29th of September was ordered to pay its amount into court. On the 27th of July Sharitt brought an action in Kansas against the railway company to recover for his services, and the company in defence pleaded the garnishment and order of the Missouri court. The amount due Sharitt having been for wages, was exempt from attachment in Kansas. It was held that the garnishment was not a defence. The facts were similar therefore to those of the case at bar.

The ground of the opinion of Mr. Justice Valentine was that the Missouri court had no jurisdiction because the situs of the debt was in Kansas. In other words, and to quote the language of the learned justice, "the situs of a debt is either with the owner thereof, or at his domicile; or where the debt is to be paid; and it cannot be subjected to a proceeding in garnishment anywhere else. . . . It is not the debtor who can carry or transfer or transport the property in a debt from one State or jurisdiction into another. The situs of the property in a debt can be changed only by the change of location of the creditor who is the owner thereof, or with his consent."

The primary proposition is that the situs of a debt is at the domicile of a creditor, or, to state it negatively, it is not at the domicile of the debtor.

The proposition is supported by some cases; it is opposed by others. Its error proceeds, as we conceive, from confounding debt and credit, rights and remedies. The right of a creditor and the obligation of a debtor are correlative but different things, and the law in adapting its remedies for or against either must regard that difference. Of this there are many illustrations, and a proper and accurate attention to it avoids misunderstanding. This court said by Mr. Justice Gray in *Wyman v. Halstead*, 109 U. S. 654, 656: "The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor." And this is not because of defective title in the creditor or in his administrator, but because the policy of the State of the debtor requires it to protect home creditors. *Wilkins v. Ellett*, 9 Wall. 740; 108 U. S. 256. Debts cannot be assets at the domicile of the debtor if their locality is fixed at the domicile of the creditor, and if the policy of the State of the debtor can protect home creditors through administration proceedings, the same policy can protect home creditors through attachment proceedings.

For illustrations in matters of taxation, see *Kirtland v. Hotchkiss*, 100 U. S. 491; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Savings and Loan Society v. Multnomah County*, 169 U. S. 421.

Our attachment laws had their origin in the custom of London. *Drake*, § 1. Under it a debt was regarded as being where the debtor was, and questions of jurisdiction were settled on that regard. In *Andrews v. Clerke*, 1 Carth. 25, Lord Chief Justice Holt summarily decided such a question, and stated the practice under the custom of London. The report of the case is brief, and is as follows:—

"Andrews levied a plaint in the sheriff's court in London and, upon the usual suggestion that one T. S. (the garnishee) was debtor to the defendant, a foreign attachment was awarded to attach that debt in the hands of T. S., which was accordingly done; and then a diletur was entered, which is in nature of an imparlance in that court.

"Afterwards T. S. (the garnishee) pleaded to the jurisdiction setting forth that the cause of debt due from him to the defendant Sir

Robert Clerke, and the contract on which it was founded, did arise, and was made at H. in the county of Middlesex, *extra jurisdictionem curiæ*; and this plea being overruled, it was now moved (in behalf of T. S., the garnishee) for a prohibition to the sheriff's court aforesaid, suggesting the said matter, (viz.) that the cause of action did arise *extra jurisdictionem*, etc., but the prohibition was denied because the debt always follows the person of the debtor, and it is not material where it was contracted, especially as to this purpose of foreign attachments; for it was always the custom in London to attach debts upon bills of exchange, and goldsmith's notes, etc., if the goldsmith who gave the note on the person to whom the bill is directed, liveth within the city without any respect had to the place where the debt was contracted."

The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. *Mooney v. Buford & George Mfg. Co.*, 72 Fed. Rep. 32; *Conflict of Laws*, § 549, and notes.

To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us.

Besides the proposition which we have discussed there are involved in the decision of the *Sharitt* case the propositions that a debt may have a situs where it is payable, and that it cannot be made migratory by the debtor. The latter was probably expressed as a consequence of the primary proposition and does not require separate

consideration. Besides there is no fact of change of domicile in the case. The plaintiff in error was not temporarily in Iowa. It was an Iowa corporation and a resident of the State, and was such at the time the debt sued on was contracted, and we are not concerned to inquire whether the cases which decide that a debtor temporarily in a State cannot be garnished there, are or are not justified by principle.

The proposition that the situs of a debt is where it is to be paid, is indefinite. "All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." 2 Parsons on Contracts, 8th edition, 702. The debt involved in the pending case had no "special limitation or provision in respect to payment." It was payable generally and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases — the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose. *Embree v. Hanna*, 5 Johns. 101; *Hull v. Blake*, 13 Mass. 153; *Blake v. Williams*, 6 Pick. 286; *Harwell v. Sharp*, 85 Georgia, 124; *Harvey v. Great Northern Railway Co.*, 50 Minnesota, 405; *Mahany v. Kephart*, 15 W. Va. 609; *Leiber v. Railroad Co.*, 49 Iowa, 688; *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468; *Holland v. Mobile & Ohio Railroad*, 84 Tenn. 414; *Pomeroy v. Rand, McNally, & Co.*, 157 Illinois, 176; *Berry Bros. v. Nelson, Davis, & Co.*, 77 Texas, 191; *Wyeth Hardware Co. v. Lang*, 127 Missouri, 242; *Howland v. Chicago, Rock Island, &c. Railway*, 134 Missouri, 474.

Mr. Justice Valentine also expressed the view that "if a debt is exempt from a judicial process in the State where it is created, the exemption will follow the debt as an incident thereto into any other State or jurisdiction into which the debt may be supposed to be carried." For this he cites some cases.

It is not clear whether the learned justice considered that the doctrine affected the jurisdiction of the Iowa courts or was but an incident of the law of situs as expressed by him. If the latter, it has been answered by what we have already said. If the former, it cannot be sustained. It may have been error for the Iowa court to have ruled against the doctrine, but the error did not destroy jurisdiction. 134 Missouri, 474.

But we do not assent to the proposition. Exemption laws are not a part of the contract; they are part of the remedy and subject to the law of the forum. *Freeman on Executions*, sec. 209, and cases cited; also *Mineral Point Railroad v. Barron*, 83 Illinois, 365; *Carson v. Railway Co.*, 88 Tennessee, 646; *Couley v. Chilcote*, 25 Ohio St. 320; *Albrecht v. Treitschke*, 17 Nebraska, 205; *O'Connor v. Walter*, 37 Nebraska, 267; *Chicago, Burlington, &c. Railroad v*



Moore, 31 Nebraska, 629; Moore v. Chicago, Rock Island, &c. Railroad, 43 Iowa, 385; Broadstreet v. Clark, D. & C. M. & St. Paul Railroad, Garnishee, 55 Iowa, 670; Stevens v. Brown, 5 West Virginia, 450. See also Bank of United States v. Donnelly, 8 Pet. 361; Wilcox v. Hunt, 13 Pet. 378; Townsend v. Jemison, 9 How. 407; Walworth v. Harris, 129 U. S. 365; Penfield v. Chesapeake, Ohio, &c. Railroad, 134 U. S. 351. As to the extent to which *lex fori* governs, see Conflict of Laws, 571 *et seq.*

There are cases for and cases against the proposition that it is the duty of a garnishee to notify the defendant, his creditor, of the pendency of the proceedings, and also to make the defence of exemption, or he will be precluded from claiming the proceedings in defence of an action against himself. We need not comment on the cases or reconcile them, as such notice was given and the defence was made. The plaintiff in error did all it could and submitted only to the demands of the law.

In Broadstreet v. Clark, 55 Iowa, 670, the Supreme Court of the State decided that exemption laws pertained to the remedy and were not a defence in that State. This ruling is repeated in Willard v. Sturm, 98 Iowa, 555, and applied to the proceedings in garnishment now under review.

It follows from these views that the Iowa court had jurisdiction, and that the Kansas courts did not give to the proceedings in Iowa the faith and credit they had there, and were hence entitled to in Kansas.

*The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.*<sup>1</sup>

## EINWOLD v. THE GERMAN WEST AFRICAN COMPANY.

SUPREME COURT OF THE CAPE OF GOOD HOPE. 1887.

[Reported 5 Juta, 86.]

THIS was a motion to attach certain goods belonging to the German West African Company to found jurisdiction.

The company consisted of Germans, and was established at Berlin, and a trading expedition had been fitted out by them under the direction of Baron von Steineker, and the plaintiff, who was also a German, had been engaged upon the expedition. The goods had been sent to Cape Town, where a vessel was to be chartered to carry them to Walwich Bay. From there the expedition was to proceed to Ovampoland — independent territory — where a station was to be erected, and cer-

<sup>1</sup> *Acc.* Cross v. Brown, 19 R. I. 220, 33 Atl. 147; M. & O. R. R. v. Barnhill, 91 Tenn. 395, 19 S. W. 21; and see Wyeth H. & M. Co. v. Lang, 127 Mo. 242, 29 S. W. 1010. — Ed.

tain of the expedition were then to proceed to the Zambesi. The plaintiff had been engaged principally as guide, on account of his knowledge of the interior. He was to receive a certain salary, to commence from the time the expedition arrived at Walwich Bay; £5 were to be paid him for expenses to Cape Town, and Steineker had also received £100 for the expenses of the members of the expedition at Cape Town. At the latter place Steineker dismissed the plaintiff from the company's service, without making these payments, and he, alleging he was about to bring an action against the company for wrongful dismissal, now made the present application. Neither the plaintiff nor Steineker was domiciled here.<sup>1</sup>

DE VILLIERS, C. J. This matter was brought before me in the course of last week in the form of an application to restrain the respondent company from removing the 160 cases which are now at the docks, on the ground that it is the intention of the applicant to bring an action for damages for breach of contract. I at once refused to make any order on such an application, because the fact that goods belonging to the respondent are in this Colony gives the applicant no right to arrest these goods. The form of the application has now been altered, and the arrest of the goods is sought on the grounds that the applicant wishes to obtain jurisdiction by means of attachment, and that the attachment is really for the purpose of founding jurisdiction in this court. The question now to be determined is whether this court ought, at the instance of a foreigner not resident in this Colony, to attach property belonging to another non-resident foreigner, for the purpose of founding jurisdiction in an action intended to be instituted here for the purpose of recovering damages for the breach of a contract entered into in a foreign country. The question has been somewhat complicated by the further question whether the contract, although entered into in Germany, is not one which must be performed in this Colony; but it is clear, from the applicant's own affidavit, that he was engaged to perform certain services in Ovampoland, and other native territories in the interior of Africa which are admitted to be beyond the jurisdiction of this court. The expedition started from Hamburg, and the fact that the starting-point in Africa is Walwich Bay, which is within the Colony, does not justify the court in the holding that the contract is to be performed within the jurisdiction. The same remark applies to the circumstance, that a portion of the applicant's travelling expenses was to be paid upon the arrival of the expedition in Cape Town. The expedition was to use certain ports of this Colony, as ports of lading, for the purpose of reaching its ultimate destination, which was the interior of Africa, where the whole of its business was to be carried on. The alleged breach of contract consists, not in refusing to pay the small sum payable on arrival in Cape Town, but in dismissing the applicant altogether, and preventing him from joining the expedition into the interior. The 30th section of the Charter of Justice enacts that the Su-

<sup>1</sup> Arguments of counsel are omitted. — ED.

preme Court "shall have cognizance of all pleas, and jurisdiction in all causes, whether civil, criminal, or mixed, arising within the said Colony, with jurisdiction over our subjects, and all other persons whomsoever, residing and being within the said Colony, in as full and ample a manner and to all intents and purposes, as the Supreme Court now existing within the said Colony now hath or can lawfully exercise the same." It has never been understood in this court that this section excludes the jurisdiction acquired over persons, not domiciled in this Colony, by means of an attachment of their person or property *ad fundandam* (or to use Voet's expression, which more correctly expresses the modern practice, *ad firmandam*) *jurisdictionem*. But I am not aware of a single case in this court, in which such an attachment has been issued, for the purpose of establishing a jurisdiction, for which no other legal ground existed. In the case of *Hornblow v. Fotheringham* (1 Menzies, 365), Menzies, J., expressed grave doubt whether the court should use its process of arrest, at the instance of a *peregrinus*, in order to create a jurisdiction which, without such arrest, it would not possess. In *Heinaman v. Jenkins* (2 Searle, 10), Bell, J., discharged a writ of arrest which had been granted against an American ship, calling at the port of Table Bay, in respect of a contract entered into at New York, to be fulfilled in Melbourne. It is true that the arrest in that case had been made under the 8th Rule of court, and that the learned judge at first decided to discharge the arrest upon grounds, which are not supported by the terms of the Rule, or by the invariable practice of the court, but upon the simple question of jurisdiction his final decision certainly did not support the present applicant's contention. In *Wilhelm v. Francis* (Buchanan's Rep., 1876, p. 216), where the plaintiff and defendant resided out of the jurisdiction of the court, and the contract between them had been entered into beyond, and was not to be performed in the Colony, this court refused to order the attachment of property for the purpose of founding jurisdiction. Two cases have been cited which at first sight might appear to support the applicant's contention, but when closely examined they will be found not to have any real application. In *Dunell v. Van der Plank* (3 Menz. 112), the headnote states that arrest of a ship to found jurisdiction was "granted at the instance of an English creditor on an English contract;" but, from the case itself, it would appear that the plaintiffs on the record were not English creditors, but persons domiciled in the Colony. The defendant's counsel indeed argued that the real plaintiffs were English creditors, but the court does not appear to have adopted this view. It is true that Menzies, J., held that the attachment ought to be granted, even if applied for by the plaintiffs as attorneys for the English creditors; but this was not the true ground of the decision, and his dictum is not quite consistent with the view expressed by him in the previous case of *Hornblow v. Fotheringham*. In *Poultney v. Van Santen* (Buch. Rep., 1874, p. 76), a rule was made absolute attaching the proceeds of the sale of an abandoned ship, pending an action by a passenger for damages arising

from the non-completion of the voyage from Buenos Ayres to New South Wales, the passage having been taken in Buenos Ayres. There, however, no objection was taken to the jurisdiction of this court, but, on the contrary, the defendant had submitted to the jurisdiction by tendering a certain sum as damages, with the costs incurred in this court.

By applying for an order to attach property to found jurisdiction, the applicant in the present case virtually admits that without such an attachment the court would not possess sufficient jurisdiction. What, then, are the grounds upon which the jurisdiction of this court can be exercised, in respect of any contract over any defendant without his consent, express or implied? The grounds are threefold; viz. by virtue of the defendant's domicile being here, by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject-matter in an action *in rem* being situated in this Colony. If the defendant is domiciled here, the process of attachment is wholly unnecessary; but, in the absence of such domicile, the invariable practice in this court has been to attach the person or the property of the defendants, for the purpose of founding jurisdiction, even where either of the two latter requisites is present. In the present case, every one of the three requisites is wanting. Ought the court then to supply the defect, by issuing its process for the attachment of property belonging to the respondent, which happens to be in the Colony in its transit to the interior? Such a process was wholly unknown to the Roman law, which, however, allowed a defendant to be sued in the courts of the country where the contract was entered into, or agreed to be performed. The canon law, according to Groenewegen (ad Cod. 3, 13, 2), did not allow a person to be sued in the country of the contract unless found there, and this rule, he adds, "is consistent with the customs of ourselves and other nations." And in another passage (ad Cod. 3, 18) he says: "Our ancestors have deemed it unjust and contrary to all reasons to send their sickle into the harvest of another jurisdiction, under the pretext of their own country being the place where a wrong was committed, or the place where a contract was entered into, or intended to be performed." He adds: "I have no doubt whatever that this custom of ours has given rise to the modern practice of arresting debtors, than which nothing is more common." The practice of arresting debtors or attaching their property in order to found jurisdiction was well established in Holland, in the time of Voet; but it is by no means clear to me, from the Dutch cases I have consulted, that it was ever actually exercised where the contract had been entered into and was to be performed elsewhere than in Holland. In actions *in rem* it was of course a common practice to attach property situate in Holland for the purpose of confirming jurisdiction. In regard to this Colony having regard to the terms of the 30th section of the Charter of Justice, and to the practice of modern nations, I am of opinion that jurisdiction ought not to be assumed by this court, in cases where not

one of the requisite grounds which I have enumerated is present. In England the process of attachment to found jurisdiction is unknown, but the jurisdiction assumed by the courts is wider than in any other country. I doubt, however, whether even in England jurisdiction would be exercised in a case like the present. In *Cookney v. Anderson* (31 Beav. 452), a bill was filed in England to administer the trusts of a Scotch creditor's deed, under which a mining concern in Scotland was to be carried on by a trustee. All the parties except the plaintiff were domiciled in Scotland, but an order had been obtained to serve the bill there. The defendants appeared and demurred to the jurisdiction. The demurrer was allowed by Sir John Romilly, Master of the Rolls, and his decision was affirmed by Lord Westbury, Lord Chancellor. "I think," said the Master of the Rolls, "the principles which govern the jurisdiction of the court over parties to contracts is analogous to those of the civil law, which, as far as I am aware, have been adopted by all modern nations. They are described by all writers to consist of three circumstances, any one of which will give jurisdiction to the tribunals of the country to take cognizance of the matter. The first is, where the domicile of the defendant is within the jurisdiction of the court. The second is where the subject-matter is situated within the jurisdiction of the court. And the third is where the contract in question was entered into within the jurisdiction of the court." He then points out the inconvenience arising from the difficulty of ascertaining the Scotch law in an English court, and of enforcing the mandates of the court against a person domiciled in Scotland, and continues thus, "It would be, as I apprehend, an unprecedented event in the records of this court, if two foreigners should enter into a contract relating to foreign affairs to be performed in their own country, that this court would allow one of them to sue the other with reference to that contract in the English tribunals. . . . The *forum domicilii*, the *forum rei sitæ*, and *forum loci contractus* are all wanting, and I can find no case or authority which would maintain such an exercise of the jurisdiction of this court."

But, quite independently of the English practice, I am satisfied, for the reasons already given, that the present is not a case in which the court should issue its process for the attachment of a foreigner's property for the purpose of confirming or establishing jurisdiction over him. The application must therefore be refused with costs.<sup>1</sup>

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### HARRIS v. BALK.

SUPREME COURT OF THE UNITED STATES. 1905.

[Reported 198 U. S. 215.]

THE facts are as follows: The plaintiff in error, Harris, was a resident of North Carolina at the time of the commencement of this action in 1896, and prior to that time was indebted to the defendant in error, Balk, also a resident of North Carolina, in the sum of \$180, for money borrowed from Balk by Harris during the year 1896, which Harris verbally prom-

<sup>1</sup> *Acc. Blaine v. Colonial Marine Assurance Co.*, 1 Juta, 462; *Wilhelm v. Francis*, 6 Buchanan, 216. And see to the same effect *Imperial Ottoman Bank v. Richardson* (Marseilles, 1893), 21 Cl. & F., 112. — Ed.

ised to repay, but there was no written evidence of the obligation. During the year above mentioned one Jacob Epstein, a resident of Baltimore, in the State of Maryland, asserted that Balk was indebted to him in the sum of over \$300. In August, 1896, Harris visited Baltimore for the purpose of purchasing merchandise, and while he was in that city temporarily on August 6, 1896, Epstein caused to be issued out of a proper court in Baltimore a foreign or non-resident writ of attachment against Balk, attaching the debt due Balk from Harris, which writ the sheriff at Baltimore laid in the hands of Harris, with a summons to appear in the court at a day named. With that attachment, a writ of summons and a short declaration against Balk (as provided by the Maryland statute) were also delivered to the sheriff and by him set up at the court house door, as required by the law of Maryland. Before the return day of the attachment writ Harris left Baltimore and returned to his home in North Carolina. He did not contest the garnishee process, which was issued to garnish the debt which Harris owed Balk. After his return Harris made an affidavit on August 11, 1896, that he owed Balk \$180, and stated that the amount had been attached by Epstein of Baltimore, and by his counsel in the Maryland proceeding Harris consented therein to an order of condemnation against him as such garnishee for \$180, the amount of his debt to Balk. Judgment was thereafter entered against the garnishee and in favor of the plaintiff, Epstein, for \$180. After the entry of the garnishee judgment, condemning the \$180 in the hands of the garnishee, Harris paid the amount of the judgment to one Warren, an attorney of Epstein, residing in North Carolina. On August 11, 1896, Balk commenced an action against Harris before a justice of the peace in North Carolina, to recover the \$180 which he averred Harris owed him. The plaintiff in error, by way of answer to the suit, pleaded in bar the recovery of the Maryland judgment and his payment thereof, and contended that it was conclusive against the defendant in error in this action, because that judgment was a valid judgment in Maryland, and was therefore entitled to full faith and credit in the courts of North Carolina. This contention was not allowed by the trial court, and judgment was accordingly entered against Harris for the amount of his indebtedness to Balk, and that judgment was affirmed by the Supreme Court of North Carolina. The ground of such judgment was that the Maryland court obtained no jurisdiction to attach or garnish the debt due from Harris to Balk, because Harris was but temporarily in the State, and the *situs* of the debt was in North Carolina.

PECKHAM, J. The State court of North Carolina has refused to give any effect in this action to the Maryland judgment; and the Federal question is, whether it did not thereby refuse the full faith and credit to such judgment which is required by the Federal Constitution. If the Maryland court had jurisdiction to award it, the judgment is valid and entitled to the same full faith and credit in North Carolina that it has in Maryland as a valid domestic judgment.

The defendant in error contends that the Maryland court obtained no jurisdiction to award the judgment of condemnation because the garnishee, although at the time in the State of Maryland, and personally served with process therein, was a non-resident of that State, only casually or temporarily within its boundaries; that the *situs* of the debt due from Harris, the garnishee, to the defendant in error herein was in North Carolina, and did not accompany Harris to Maryland; that, consequently, Harris, though within the State of Maryland, had not possession of any property of Balk, and the Maryland State court therefore obtained no jurisdiction over any property of Balk in the attachment proceedings, and the consent of Harris to the entry of the judgment was immaterial. The plaintiff in error, on the contrary, insists that, though the garnishee were but temporarily in Maryland, yet the laws of that State provide for an attachment of this nature, if the debtor, the garnishee, is found in the State and the court obtains jurisdiction over him by the service of process therein; that the judgment, condemning the debt from Harris to Balk, was a valid judgment, provided Balk could himself have sued Harris for the debt in Maryland. This, it is asserted, he could have done, and the judgment was therefore entitled to full faith and credit in the courts of North Carolina.

The cases holding that the State court obtains no jurisdiction over the garnishee if he be but temporarily within the State, proceed upon the theory that the *situs* of the debt is at the domicile either of the creditor or of the debtor, and that it does not follow the debtor in his casual or temporary journey into another State, and the garnishee has no possession of any property or credit of the principal debtor in the foreign State.

We regard the contention of the plaintiff in error as the correct one. The authorities in the various State courts upon this question are not at all in harmony. They have been collected by counsel, and will be found in their respective briefs, and it is not necessary to here enlarge upon them.

Attachment is the creature of the local law; that is, unless there is a law of the State providing for and permitting the attachment it cannot be levied there. If there be a law of the State providing for the attachment of the debt, then if the garnishee be found in that State, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that State. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original *situs* of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the State where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the State where the writ issues. *Blackstone v. Miller*, 188 U. S. 189, 206. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable

to process of garnishment, no matter where the *situs* of the debt was originally. We do not see the materiality of the expression "*situs* of the debt," when used in connection with attachment proceedings. If by *situs* is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the *situs* thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign State when therein sued upon his obligation by his creditor, as he was in the State where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defence to such suit for the debtor to plead that he was only in the foreign State casually or temporarily. His obligation to pay would be the same whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign State after personal service of process therein, just as well as by the courts of the domicile of the debtor. If the debtor leave the foreign State without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other State where the debtor might be found. In such case the *situs* is unimportant. It is not a question of possession in the foreign State, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the State where the attachment is laid. His obligation to pay to his creditor is thereby arrested and a lien created upon the debt itself. *Cahoon v. Morgan*, 38 Vt. 234, 236; *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 483. We can see no reason why the attachment should not be thus laid, provided the creditor of the garnishee could himself sue in that State and its laws permitted the attachment.

There can be no doubt that Balk, as a citizen of the State of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several States, one of which is the right to institute actions in the courts of another State. The law of Maryland provides for the attachment of credits in a case like this. See sections 8 and 10 of Article 9 of the Code of Public General Laws of Maryland, which provide that, upon the proper facts being shown (as stated in the article), the attachment may be sued out against lands, tenements, goods, and credits of the debtor. Section 10 particularly provides that "Any kind of property or *credits* belonging to the defendant, in the plaintiff's own hands, or in the hands of any one else, may be attached; and credits may be attached which shall not then be due." Sections 11, 12, and 13 of the above-mentioned



article provide the general practice for levying the attachment and the proceedings subsequent thereto. Where money or credits are attached the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee, and the judgment condemning the amount in his hands becomes a personal judgment against him. *Buschman v. Hanna*, 72 Md. 1, 5, 6. Section 34 of the same Maryland Code provides also that this judgment of condemnation against the garnishee, or payment by him of such judgment, is pleadable in bar to an action brought against him by the defendant in the attachment suit for or concerning the property or credits so condemned.

It thus appears that Balk could have sued Harris in Maryland to recover his debt, notwithstanding the temporary character of Harris' stay there; it also appears that the municipal law of Maryland permits the debtor of the principal debtor to be garnished, and therefore if the court of the State where the garnishee is found obtains jurisdiction over him, through the service of process upon him within the State, then the judgment entered was a valid judgment. See *Minor on Conflict of Laws*, section 125, where the various theories regarding the subject are stated and many of the authorities cited. He there cites many cases to prove the correctness of the theory of the validity of the judgment where the municipal law permits the debtor to be garnished, although his being within the State is but temporary. See pp. 289, 290. This is the doctrine which is also adopted in *Morgan v. Neville*, 74 Pa. St. 52, by the Supreme Court of Pennsylvania, per Agnew, J., in delivering the opinion of that court. The same principle is held in *Wyeth Hardware & Co. v. Lang*, 127 Mo. 242, 247; in *Lancashire Insurance Co. v. Corbetts*, 165 Ill. 592; and in *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 406, 407; and to the same effect is *Embree v. Hanna*, 5 Johns. (N. Y.) 101; also *Savin v. Bond*, 57 Md. 228, where the court held that the attachment was properly served upon a party in the District of Columbia while he was temporarily there; that as his debt to the appellant was payable wherever he was found, and process had been served upon him in the District of Columbia, the Supreme Court of the District had unquestioned jurisdiction to render judgment, and the same having been paid, there was no error in granting the prayer of the appellee that such judgment was conclusive. The case in 138 N. Y. 209, *Douglass v. Insurance Co.*, is not contrary to this doctrine. The question there was not as to the temporary character of the presence of the garnishee in the State of Massachusetts, but, as the garnishee was a foreign corporation, it was held that it was not within the State of Massachusetts so as to be liable to attachment by the service upon an agent of the company within that State. The general principle laid down in *Embree v. Hanna*, 5 Johns. (N. Y.) 101, was recognized as correct. There are, as we have said, authorities to the contrary, and they cannot be reconciled.

It seems to us, however, that the principle decided in *Chicago, R. I. & Co. Ry. Co. v. Sturm*, 174 U. S. 710, recognizes the jurisdiction, although in that case it appears that the presence of the garnishee was not merely

a temporary one in the State where the process was served. In that case it was said: "All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere.' 2 Parsons on Contracts, 8th ed., 702 (9th ed., 739). The debt involved in the pending case had no 'special limitation or provision in respect to payment.' It was payable generally, and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases,—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose." The case recognizes the right of the creditor to sue in the State where the debtor may be found, even if but temporarily there, and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in the foreign State, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff, in such proceeding in the foreign State, is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign State his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the State where the attachment was sued out permits it.

It seems to us, therefore, that the judgment against Harris in Maryland, condemning the \$180 which he owed to Balk, was a valid judgment, because the court had jurisdiction over the garnishee by personal service of process within the State of Maryland.

It ought to be and it is the object of courts to prevent the payment of any debt twice over. Thus if Harris, owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment. It is objected, however, that the payment by Harris to Epstein was not under legal compulsion. Harris in truth owed the debt to Balk, which was attached by Epstein. He had, therefore, as we have seen, no defence to set up against the attachment of the debt. Jurisdiction over him personally had been obtained by the Maryland court. As he was absolutely without defence, there was no reason why he should not consent to a judgment impounding the debt, which judgment the plaintiff was legally entitled to, and which he could not prevent. There was no merely voluntary payment within the meaning of that phrase as applicable here.

But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of

Balk, he ought not to be permitted to set up the judgment as a defence. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. This duty is affirmed in the case above cited of *Morgan v. Neville*, 74 Pa. St. 52, and is spoken of in *Railroad Co. v. Sturm*, *supra*, although it is not therein actually decided to be necessary, because in that case notice was given and defence made. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment thereunder. This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit. Fair dealing requires this at the hands of the garnishee. In this case, while neither the defendant nor the garnishee appeared, the court, while condemning the credits attached, could not, by the terms of the Maryland statute, issue the writ of execution unless the plaintiff gave bond or sufficient security before the court awarding the execution, to make restitution of the money paid if the defendant should, at any time within a year and a day, appear in the action and show that the plaintiff's claim, or some part thereof, was not due to the plaintiff. The defendant in error, Balk, had notice of this attachment, certainly within a few days after the issuing thereof and the entry of judgment thereon, because he sued the plaintiff in error to recover his debt within a few days after his (Harris') return to North Carolina, in which suit the judgment in Maryland was set up by Harris as a plea in bar to Balk's claim. Balk, therefore, had an opportunity for a year and a day after the entry of the judgment to litigate the question of his liability in the Maryland court and to show that he did not owe the debt, or some part of it, as was claimed by Epstein. He, however, took no proceedings to that end, so far as the record shows, and the reason may be supposed to be that he could not successfully defend the claim, because he admitted in this case that he did, at the time of the attachment proceeding, owe Epstein some \$344.

Generally, though, the failure on the part of the garnishee to give proper notice to his creditor of the levying of the attachment would be such a neglect of duty on the part of the garnishee which he owed to his creditor as would prevent his availing himself of the judgment in the attachment suit as a bar to the suit of his creditor against himself, which might therefore result in his being called upon to pay the debt twice.

The judgment of the Supreme Court of North Carolina must be reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court.

*Reversed.*

Mr. Justice HARLAN and Mr. Justice DAY dissented.

## TODESCO v. DUMONT.

CIVIL TRIBUNAL OF THE SEINE. 1890.

[*Reported 18 Clunet, 559.*]

THE COURT. Todesco, an Austrian subject domiciled at Vienna, alleges that Dumont, a German without known domicile at Paris, residing in London, should be ordered to pay him 44,700.95 francs, the amount of a note made by Dumont to Todesco, dated Augsburg, March 9, 1876, registered at Paris, Aug. 16, 1889. Todesco further prays the court to validate the garnishment made by him upon this note, on Betzold, a banker of Paris, Aug. 16, 1889. Incidentally Todesco moves that the question of validation be continued until a competent court has passed on the validity of the principal obligation. Dumont pleads to the jurisdiction of this court, on the ground that the parties are foreigners, and the obligation was contracted in another country.

Though the court is incompetent in such a case to determine, as between strangers, the existence of the obligation, it is on the contrary competent to pass upon the legality of an attachment or of a levy of execution resulting from a garnishment made within its jurisdiction. It ought always to grant a continuance to the attaching creditor to enable him to prove his claim before a competent court, on penalty, in case of failure to do so, of nullity of the whole process.

On these grounds the court has jurisdiction only of the question of the validity of the garnishment. A continuance is granted for six months from this date, within which time, on penalty of nullity, Todesco shall sue said Dumont, on the principal obligation, before a court of competent jurisdiction.

## SECTION IV.

JURISDICTION FOR DIVORCE.

## LE MESURIER v. LE MESURIER.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. 1895.

[*Reported [1895] Appeal Cases, 517.*]

APPEAL from the Supreme Court of Ceylon, which dismissed appellant's libel for divorce on the ground of lack of jurisdiction. At the time of the marriage (which was solemnized in England) appel-

lant, the husband, was and has since remained a resident of Ceylon, but was then and has since remained domiciled in England. The respondent was a Frenchwoman.<sup>1</sup>

The judgment of their Lordships was delivered by LORD WATSON.

When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognized rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage.

*Tollemache v. Tollemache*, 1 Sw. & Tr. 557, which was decided by three judges in 1859, shortly after the passing of the Divorce Act, appears to be an authority to the contrary. The learned judges sustained the jurisdiction of the English court, which was the forum of the husband's domicile, and disregarded as incompetent a decree of the Court of Session dissolving his marriage, although he had a matrimonial domicile in Scotland, where he had *bona fide* resided for four years with his wife, neither casually nor as a traveller. Then in *Brodie v. Brodie*, 2 Sw. & Tr. 259, in the year 1861, three learned judges decided the opposite, holding that residence of that kind, which had been found in *Tollemache v. Tollemache*, to be insufficient to give jurisdiction to a Scottish court where the domicile was English, was nevertheless sufficient to give jurisdiction to themselves where the domicile was Australian. In *Wilson v. Wilson*, L. R. 2 P. & D. 435, jurisdiction was sustained by Lord Penzance upon the ground that the petitioner had acquired an English domicile, with an expression of opinion by his Lordship that such domicile ought to be the sole ground of jurisdiction to dissolve marriage. In *Niboyet v. Niboyet*, 4 P. D. 1, Sir Robert Phillimore expressed a similar opinion, and dismissed the suit of the petitioner, who had a matrimonial domicile in England which fully answered the definition of such domicile given either in *Brodie v. Brodie* or in *Pitt v. Pitt*, 1 Court Sess. Cas. 3d Series, 106, 4 Macq. App. Cas. 627. His decision was, no doubt, reversed in the Court of Appeal; but it had the support of the present Master of the Rolls, and their Lordships have already pointed out that the judgment of the majority was mainly, if not altogether, based upon a reason which will not bear scrutiny.

The Scottish decisions appear to their Lordships to be equally inefficient to show that a matrimonial domicile is a recognized ground of divorce jurisdiction. So far as they go, they are consistent enough but the doctrine appears to have had a very brief existence, because the three cases in which it was applied all occurred between the 7th of February and the 14th of December in the year 1862. Although, owing to the course taken by the appellant's counsel in *Pitt v. Pitt*, 1 Court Sess. Cas. 3d Series, 106, 4 Macq. App. Cas. 627, the House of Lords had not an opportunity of expressly

<sup>1</sup> This short statement of facts is substituted for that of the reporter. Arguments of counsel and part of the opinion are omitted. — Ed.

deciding the point, there can be little doubt that the approval of the course adopted by counsel, which was openly expressed by Lord Westbury, has had the effect of discrediting the doctrine in Scotland; and it is impossible to affirm that the Court of Session would now give effect to it. The eminent judge who, in 1862, was the first to give a full and clear exposition of the doctrine of matrimonial domicile, spoke of it, in the year 1882, not as a doctrine accepted in the law of Scotland, but as matter of speculation.

It is a circumstance not undeserving of notice that the learned judges, whether English or Scottish, who have expressed judicial opinions in favor of a matrimonial domicile, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any municipal law to the contrary. The reason for their abstinence is probably to be found in the circumstance that nothing could be extracted from these sources favorable to the view which they took. Their Lordships are of opinion that in deciding the present case, on appeal from a colony which is governed by the principles of the Roman-Dutch law, these authorities ought not to be overlooked.

Huber (Lib. 1, tit. 3, s. 2, *Dé Conf. Leg.*) states the rule of international law in these terms: "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*" That passage was cited with approbation by Lord Cranworth and Lord Westbury in *Shaw v. Gould*,<sup>\*</sup> L. R. 3 H. L. 72, 81. To the same effect, but in language more pointed, is the text of Rodenburg (*De Stat. Divers.* tit. 1, c. 3, s. 4), cited in the same case by Lord Westbury: "*Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quæritur, uni solummodo Judici, et quidem Domicilii, universum in illâ jus sit attributum.*" The same rule is laid down by Bar, the latest Continental writer on the theory and practice of international private law. He says (sect. 173, Gillespie's Translation, p. 382), "that in actions of divorce — unless there is some express enactment to the contrary — the judge of the domicile or nationality is the only competent judge." And he adds: "A decree of divorce, therefore, pronounced by any other judge than a judge of the domicile or nationality, is to be regarded in all other countries as inoperative."

There can, in their Lordships' opinion, be no satisfactory canon of international law, regulating jurisdiction in divorce cases, which is not capable of being enunciated with sufficient precision to ensure practical uniformity in its application. But any judicial definition of matrimonial domicile which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result. The definitions given in *Brodie v. Brodie*, 2 Sw. & Tr. 259, and in *Pitt v. Pitt*, 1 Court Sess. Cas. 3d Series. 106, 4 Macq. App. Cas. 627, appear to their Lordships to be equally

open to that objection. *Bona fide* residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicile. Residence which is "not that of a traveller" is not very definite; but nothing can be more vague than the description of residence which, not being that of a traveller, is not to be regarded as "casual." So, also, the place where it is the duty of the wife to rejoin her husband, if they happen to be living in different countries, is very indefinite. It may be her conjugal duty to return to his society although he is living as a traveller, or casually, in a country where he has no domicile. Neither the English nor the Scottish definitions, which are to be found in the decisions already referred to, give the least indication of the degree of permanence, if any, which is required in order to constitute matrimonial domicile, or afford any test by which that degree of permanence is to be ascertained. The introduction of so loose a rule into the *jus gentium* would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of international jurisprudence to prevent.

Their Lordships attach great weight to the consideration that the theory of matrimonial domicile for which the appellant contends has never been accepted in the court of last resort for England and Scotland. The matter does not rest there; because the theory is not only in direct opposition to the clear opinion expressed by Lord Westbury in *Pitt v. Pitt*, 1 Court Sess. Cas. 3d Series, 106, 4 Macq. App. Cas. 627, but appears to their Lordships to be at variance with the principles recognized by noble and learned Lords in *Dolphin v. Robins*, 7 H. L. C. 390, and in *Shaw v. Gould*, L. R. 3 H. L. 55. It is true that in these cases, and especially in *Dolphin v. Robins*, there was ground for holding that the spouses had resorted to a foreign country and a foreign tribunal in order to escape from the law and the courts of their English domicile. But in both the international principle upon which jurisdiction to dissolve a marriage depends, was considered and discussed; and the arguments addressed to their Lordships in favor of matrimonial domicile by the learned counsel for the appellant appear to them to be at variance with the weighty observations which were made by noble and learned Lords in these cases. In *Dolphin v. Robins*, Lord Cranworth stated that "it must be taken now as clearly established that the Scotch court has no power to dissolve an English marriage, where, as in this case, the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch courts, gives them jurisdiction in the matter." In *Shaw v. Gould* the dicta of noble and learned lords upon the point raised in this appeal were even more emphatic. Lords Cranworth and Westbury expressed their entire approval of the doctrine laid down by Huber and Rodenburg in those passages which have already been cited.

Their Lordships did not go the length of saying that the courts of no other country could divorce spouses who were domiciled in England; but they held that the courts of England were not bound, by any principle of international law, to recognize as effectual the decree of a foreign court divorcing spouses who, at its date, had their domicile in England. The other noble and learned lords who took part in the decision of *Shaw v. Gould*, L. R. 3 H. L. 55, were Lords Chelmsford and Colonsay. Lord Chelmsford did not express any opinion upon the subject of matrimonial domicile. Lord Colonsay rested his judgment upon the fact that the spouses had resorted to Scotland for the very purpose of committing a fraud upon the law of their English domicile; but he did indicate an opinion that, in the absence of such fraudulent purpose, they might possibly have obtained a divorce in Scotland, after a residence in that country which was insufficient to change their domicile of succession.

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson v. Wilson*, L. R. 2 P. & D. 442, which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce: "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

Their Lordships will, therefore, humbly advise Her Majesty to affirm the order appealed from. The appellant must pay to the first and fourth respondents their costs of this appeal.<sup>1</sup>

<sup>1</sup> The doctrine that jurisdiction for divorce depends solely upon the domicile of the husband is now fully established in England. *Shaw v. Att.-Gen.*, L. R. 2 P. & D. 156; *Green v. Green*, [1893] P. 89. *Acc. Humphrey v. Humphrey*, 33 Scot. L. R. 99. — Ed.



## ARMYTAGE v. ARMYTAGE.

HIGH COURT OF JUSTICE, PROBATE DIVISION. 1898.

[*Reported* [1898] *Probate*, 178.]

GORELL BARNES, J.<sup>1</sup> This is a suit for judicial separation by Mrs. Armytage against her husband on the ground of his alleged cruelty towards her. By his answer the respondent has denied the alleged cruelty, and by an act on petition he has further pleaded that the court has no jurisdiction to entertain the suit. I have, therefore, to determine a question of fact, whether there has been cruelty by the respondent to the petitioner, and a question of law, whether the court has jurisdiction in the circumstances to entertain the suit. The second question raises a point of considerable importance in private international law.

The parties were married at Toorak, near Melbourne, Australia, on April 11, 1888, and there are two children of the marriage, whose custody the petitioner seeks to obtain. The respondent is by birth an Australian, and his domicile is in the colony of Victoria. He was educated at Cambridge, and has been called to the English Bar. The petitioner is an Englishwoman, born in England, of parents residing at Blackheath, near London. The respondent and the petitioner became acquainted on board ship on the passage from this country to Melbourne, and their marriage was celebrated shortly afterwards. They cohabited in Australia and in England, and afterwards in Italy, and the occurrences which give rise to this suit took place at Florence in April and May, 1897. . . .

The further facts necessary to refer to are these: The petitioner came to this country with her children on or about May 25, 1897, and she and the children have since resided under her parents' roof and at Bexhill. The respondent's solicitor on May 31, 1897, wrote on behalf of the respondent to the petitioner and her father requesting the petitioner to return with the children to her husband, but she declined to comply with this request. At the end of June, 1897, the respondent came to, and has since resided in, England, but I understand he has not taken up a permanent residence here, and has only come to and is remaining in England for the purpose of enforcing, and so long as may be necessary to determine, such rights as he may have against the petitioner with regard to the children. In the month of November, 1897, he settled the sum of £100 on each of his children, and made them wards of Court in Chancery. He thereupon applied to North, J., for an order for the custody of the children, which was met by a cross-application on the part of the petitioner. In the meantime these proceedings were commenced, and the respondent was served with the citation and petition in this country. North, J., ordered the application

<sup>1</sup> Part of the opinion is omitted. — Ed.

before him to stand over until after the determination of this suit. The question to be decided, therefore, is whether or not this court can entertain a suit for judicial separation by the petitioner against the respondent in the circumstances above stated. . . .

The court does not now pronounce a decree of dissolution where the parties are not domiciled in this country, except in favor of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who, up to the time when she was deserted or began so to be, was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such circumstances a wife may acquire a domicile of her own in the country of the matrimonial home, it is considered that, in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country. The jurisdiction to dissolve marriages was conferred upon this court by the Matrimonial Causes Act, 1857, and although that act does not expressly make domicile a test of jurisdiction, that test is applied by the court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law, an adherence to which is necessary, as Lord Penzance said in *Wilson v. Wilson*, L. R. 2 P. & M. 435, at p. 442, in order to "preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another." These principles are expounded by many jurists in this and other countries. They are based on the principle that a person's status ought to depend on the law of his domicile, though there may be limitations and exceptions to this principle: see Dicey's *Conflict of Laws*, 1896, cap. 18, p. 474, *et seq.* (conf. Savigny, s. 362, Guthrie's translation, 2d ed. p. 148).

The jurisdiction in suits other than suits for dissolution of marriage is conferred on the court by the 6th section of the act aforesaid. By other sections judicial separation is substituted for the old divorce *a mensa et thoro*, and a new ground for separation, namely, desertion without cause for two years and upwards, is added. Sect. 22 provides as follows: "In all suits and proceedings other than proceedings to dissolve any marriage, the said court shall proceed, and act, and give relief on principles and rules which, in the opinion of the said court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this act." There are no special provisions of the act or rules or orders which directly affect the present question. The present suit is for judicial separation on the ground of cruelty. Before the act it would have been a suit for divorce *a mensa et thoro* on the same ground, and the inquiry is as to the principles and rules on which the Ecclesiastical Courts would have acted in the circumstances. The petitioner main-

tains that the test of domicile is not applicable as in a suit for dissolution of marriage, and that the Ecclesiastical Courts would have given her relief where she and her husband are both residing in England in the circumstances proved, whereas the respondent maintains that no relief would have been given because the parties are not domiciled in England, and no act of cruelty has been proved within the jurisdiction. . . .

Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles upon which the dissolubility or indissolubility of marriage depends, but there is little to be found in the works of such writers on the question of jurisdiction to decree the separation or divorce *a mensa et thoro* of married persons who are residing but not domiciled in the country of the forum. The reasons are not far to seek. Dissolution of marriage has been permitted in some States and not in others, and has been allowed in some States on grounds different from those on which it could be obtained in others. There has been want of unanimity as to the forum which ought to take cognizance of the question of divorce, and as to the laws to be applied and the recognition to be accorded in one State to a decree of dissolution of marriage pronounced in another. Persons domiciled in a country where divorce has not been permitted, or only permitted on certain grounds, have, in order to obtain divorces, temporarily resided or assumed domicile in another country where divorce has been permitted or more easily obtained than in the former country. Hence numerous difficult and varied questions have arisen and been discussed in reported cases and by different jurists upon the question of dissolution of marriage. But in practice suits for judicial separation or divorce *a mensa et thoro* and restitution of conjugal rights do not appear to have given rise to similar difficulties, and, therefore, cases and discussions as to jurisdiction in these suits are not often met with. Such suits generally occur before the tribunals of the country in which the parties are in fact domiciled, and a case like that before me was not so likely to occur in former days as at the present time, when large numbers of people are to be found residing for more or less lengthy periods away from the place of their domicile.<sup>1</sup> . . .

I conclude from the writers to whom I have referred that most of them are disposed to consider that the courts of the country in which the parties are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party.

Lord Hannen may possibly have had such a case in his mind when, in giving judgment in *Firebrace v. Firebrace*, (1878) 4 P. D. 63, he said, "The domicile of the wife is that of the husband, and her remedy for matrimonial wrongs must be usually sought in the place of that

<sup>1</sup> The learned judge here cited and examined 4 Phil. Int. L. 382; Burge, Colon. Laws, 668; Bishop, Mar. & Div. s. 158; Guthrie's Bar's Priv. Internat. Law, 381; Westlake, Priv. Internat. Law, s. 47; Fraser, Husb. & Wife, 1294; Wharton, Confl. Laws, s. 210. -- Ed.

domicile ;” but added : “ It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident, though not domiciled.” 4 P. D. at p. 67. That was a suit for restitution of conjugal rights where the respondent, the husband, who was domiciled in Australia, had left England before the institution of the suit, and it was held that the court had not jurisdiction over him after he left this country, and that the suit could not be maintained. Had he remained in England it would seem from the cases of *Newton v. Newton*, (1885) 11 P. D. 11, and *Thornton v. Thornton*, (1886) 11 P. D. 176, that the suit could have been maintained. In the recent case of *Christian v. Christian*, (1897) 78 L. T. 86, the President said that a suit for judicial separation may be founded upon matrimonial residence only as distinguished by our law from domicile.

Having considered sufficiently for the purposes of the case the opinions of the jurists above mentioned, it is necessary that I should revert to the 22d section of the Act of 1857, which requires the court in such a suit as the present to act conformably to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief.

There are several works which deal more particularly with the jurisdiction and mode of proceeding in the Ecclesiastical Courts — e. g., Burn’s Ecclesiastical Law, ed. 1842, Rogers’s Ecclesiastical Law, ed. 1849, Shelford’s Law of Marriage and Divorce, ed. 1841, and older works, such as Godolphin’s Abridgment ; but I cannot trace in them any statement upon the precise point in question, and the principles to govern it must be deduced from the general principles and practice of the courts. These are stated in general terms so far as concerns the matter under consideration by James, L. J., in his judgment above referred to, see *Niboyet v. Niboyet*, 4 P. D. 1 at p. 3, where the jurisdiction of the Court Christian is considered, and it is pointed out that the Church and its jurisdiction had nothing to do with the original nationality or acquired domicile of the parties, that residence as distinct from casual presence on a visit or *in itinere* was an important element, but that residence had no connection with or little analogy to the question of a person’s domicile.

In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an Ecclesiastical Court, that court would have interfered, if the parties were within the jurisdiction at the commencement of the suit, to protect the injured party against the other party in respect of the adultery or cruelty of the latter, and I can find no authority for the suggestion made by the respondent’s counsel that such interference would be limited to cases where the offence complained of was committed within the jurisdiction. In *Warrender v. Warrender*, (1835) 2 Cl. & F. 488, at p. 562, Lord Lyndhurst said : “ The law, either in this country or in Scotland, makes no distinction in respect of the place of the commission of the offence.” Although the Ecclesiastical Courts could not extinguish the mutual obligations of

husband and wife, they, acting *pro salute animæ*, suspended these obligations in order to protect and relieve the injured party. It could make no difference, where the parties were residing within the jurisdiction, that the necessity for protection and relief arose in consequence of adultery committed by the wrong-doer while temporarily outside the jurisdiction, or of cruelty committed while the parties were temporarily outside the jurisdiction, and the apprehension of further acts of cruelty remained. If the parties were within the jurisdiction, and the necessities of the case demanded that one of them should be protected against a matrimonial wrong done by the other of which the courts would take cognizance, I cannot doubt that the courts would have interfered. The case of *Manning v. Manning*, (1871) L. R. 2 P. & M. 223, which was relied upon by the respondent's counsel, is no authority against this view, because in that case the respondent was not within the jurisdiction of the court, and the petitioner was held not to be a *bona fide* resident in England. If the respondent's contention be correct no decree of judicial separation could be made, even in cases like *Niboyet v. Niboyet*, 4 P. D. 1, where the parties, though not domiciled, were resident for years in this country.

Then, does the present case fall within the principles and rules upon which the courts have acted? I think it does. The wife, an Englishwoman, whose domicile of origin was English, and who has resided at times in England with her husband, is forced, by the cruelty committed in Italy by her husband, a domiciled Australian, to seek the protection of her parents in England. Though legally domiciled in Australia, as a matter of fact she has been forced to separate herself from her husband and establish herself in a home of her own in this country. She and her husband are both within the jurisdiction. She has been required to return with her children to her husband, and is afraid to do so owing to her apprehension of a repetition of the acts of cruelty which have been committed against her while they were living together abroad. It is against the repetition of apprehended acts of cruelty that the court grants its protection, and, unless the court interferes, there is nothing to prevent the husband from forcing himself upon his wife and placing her in a position in which she may be subjected to further acts of cruelty. The status of married persons within the country is recognized. Performance of the duties arising from the marriage tie should be required, and protection afforded against an abuse of the position resulting from that tie where necessary. Police protection is an inadequate remedy.

It may be objected that a decree of judicial separation affects the status of the parties, and that a change of status ought on principle only to be effected by the courts of the domicile. But the relief is to be given on principles and rules which, in the opinion of the court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts gave relief. According to those principles and rules cruelty and adultery were grounds for a sentence of

divorce *a mensa et thoro* which did not dissolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties. The sentence commonly separated the parties until they should be reconciled to each other. The relation of marriage still subsisted, and the wife remained a feme covert. A woman divorced by the court *a mensa et thoro* and living separate and apart from her husband could not be sued as a feme sole (see *Lewis v. Lee*, 1824, 3 B. & C. 291). The effect of the sentence was to leave the legal status of the parties unchanged. Although a sentence of judicial separation is to have the effect of a divorce *a mensa et thoro* under the old law (s. 16 of the Act of 1857), and also the further effect of placing the wife in the position of a feme sole, with respect to property which she may acquire, or which may come to or devolve upon her, from the date of the sentence and whilst the separation continues, and also for the purposes of contract and wrongs and injuries and suing and being sued during that period (ss. 25 and 26 of the Act of 1857); yet as the relief to be given now is to be given according to the principles and rules in force in the Ecclesiastical Courts, I am of opinion that the effect of the said ss. 25 and 26, if they affect a wife's status within the meaning of the term as applied to the principles under consideration, which is doubtful, is not to deprive the court of the power to grant relief in cases where it would have been granted by the Ecclesiastical Courts.

It may be further objected that, as domicile is considered a test of jurisdiction in cases of dissolution of marriage, in order that the decree may be recognized in countries other than that of the domicile, for the same reason a similar test should be applied in cases of judicial separation. But the reasons which apply in the one case are not applicable to the other; and even if the principle should be established that the courts of the country of the domicile of the parties are the only courts which can pronounce a decree of judicial separation which ought to be recognized in other countries, in my opinion, no valid reason can be urged against the courts of a country, in which a husband and wife are actually living, pronouncing a decree which will protect the one against the other so long as they remain within the jurisdiction.

In the present case the wife's domicile is legally in Australia, but, as a matter of fact, she has justifiably separated herself from her husband and made her home in England, and it is in England that she now requires protection. He has come here and subjected himself to the jurisdiction of the courts of this country. Could anything be more unreasonable than for this court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country, and leave her to proceed in the courts in Australia to protect herself against her husband in England? It may, I think, be safely laid down that the Ecclesiastical Courts would formerly, and this court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such

intervention. I therefore hold that this court has jurisdiction to entertain this suit, and I pronounce a decree of judicial separation in favor of the petitioner with costs. Having held that the court has jurisdiction to entertain the suit, I think it follows that the court has jurisdiction under the powers expressly conferred upon it by the 35th section of the said Act of 1857, and the 4th section of the Matrimonial Causes Act, 1859, to make provision for the custody of the children of the marriage; and, as I have heard the case, it is probably more convenient that I should dispose of this matter rather than leave it for further contest in the chancery proceedings. I will hear any application relating to the children in chambers.

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## DITSON v. DITSON.

SUPREME COURT OF RHODE ISLAND. 1856

[Reported 4 Rhode Island, 87.]

AMES, C. J.<sup>1</sup> It is a well-settled principle of general law upon this subject, that the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual *bona fide* domicile within its territory; and this holds, whether one or both the parties be temporarily residing within reach of the process of the court, or whether the defendant appears or not, and submits to the suit. This necessarily results from the right of every nation or State to determine the status of its own domiciled citizens or subjects, without interference by foreign tribunals in a matter with which they have no concern. Bishop on Marriage and Divorce, § 721, p. 721, 2d ed. and cases cited. We entirely agree with the judgment given by the Supreme Court of Massachusetts on this point, in the well-considered case of Hanover v. Turner, 14 Mass. 227, 231, in which both this rule, and the reason for it are stated with that precision and largeness of view, which indicate that the court fully comprehended the question before them as a question of general law; a kind of praise which cannot, with any justice, be bestowed upon many American cases upon this important and interesting subject. . . .

The question raised by the case at bar, and for the decision of which in the affirmative this court is said by the Supreme Court of Massachusetts in *Lyon v. Lyon*, 2 Gray, 367, to have pronounced a decree in favor of Mrs. Lyon void upon general principles of law, is, whether the *bona fide* domiciliation of the petitioning party in this State is sufficient to give this court jurisdiction to grant a divorce *a vinculo*, although the other party to the marriage to be dissolved has never been subject to our jurisdiction, never been personally served

<sup>1</sup> Part of the opinion only is given. — ED

with notice of the petition within the State, or appeared and answered to the petition, upon constructive notice, or upon being served with personal notice of it, out of the State? In other words, the question is, whether, as a matter of general law, a valid decree of divorce *a vinculo* can be passed in favor of a domiciled citizen of the State, upon mere constructive notice to the foreign or non-resident party to the marriage, against whom, or to dissolve whose marital rights over or upon the petitioner, the aid of the court is invoked? . . .

It is undoubtedly true, as a common-law principle, applicable to the judgments of its courts, that they bind only parties to them, or persons in such relation to the parties and to the subject of the judgment, as to be deemed privies to it. The rule of this system of jurisprudence, which brings privies within the operation of the notice served upon the principals to a judgment and binds them by its effects, is founded upon quite as clear a policy, and is sanctioned by quite as complete justice, as that which renders the judgment obligatory upon those whom they represent. It is founded upon the great policy *ut sit finis litum*, and upon the necessity, to carry out this policy, that the future and contingent representatives of the parties in relation to the subject of the judgment should be bound by it. Again, there is no system of jurisprudence, which, founded as the jurisdiction of the court is upon the personal service of the subpoena, is more special in its requisition that all parties interested should be served in the suit, in order to be bound by the decree, than that administered by the English chancery; yet even in this court, from the same policy, and upon the same necessity, the first tenant in tail, or the first person entitled to the inheritance, if there be no tenant in tail living, or even the tenant for life, as the only representative to be found of the whole inheritance, by his appearance to the suit binds to the decree in it all those subsequently and contingently interested in the estate; the court, in administering this rule of representation of parties, taking care only that the representative be one whose interest in the subject of the suit is such as to insure his giving a fair trial to the question in contestation, the decision of which is to affect those who remotely or contingently take after him. Again, there is the large class of proceedings *in rem*, or *quasi in rem*, known especially to courts administering public or general law, and borrowed from thence into every system of jurisprudence in which, the jurisdiction being founded upon the possession of the thing, the decree binds all interested in it, whether within or without the jurisdiction of the nation setting up the court, and whether personally or constructively notified of the institution or currency of the proceeding. This, too, is founded upon a necessity or high expediency, since, without it, a prize or instance court, for example, could not, so scattered or concealed are the parties interested, perform any of the functions for which, by the general or public law, it is set up. Proceedings of this nature must, we think,



be familiar to the courts of Massachusetts; and probably not a day passes in which things within their jurisdiction are not, by direct attachment or garnishee process, seized, attached, condemned, and sold under their judgments, without other than constructive notice to the non-resident owners of them, in order that these courts may do justice to their own citizens, or even to alien friends, properly applying to them for relief. Here, too, necessity requires the courts to dispense with personal notice, in order to give effect to their judicial orders; since otherwise, the State might be full of the property of non-residents and aliens, applicable to all purposes except the commanding ones of justice. Without doubt, in these and other like cases, the general law in dispensing with personal notice from necessity, requires some fair approximation to it, by representation, substitution, or at least such publicity, as under the circumstances, is proper and possible, or the proceeding will be regarded as a fraud upon the rights of the absent and unprotected, — a robbery under the forms of law, and so a fraud upon law itself. It is, however, a very narrow view of the general law, it is to form a very low estimate of the wisdom which directs its administration, to suppose, that when it can do justice to those within its jurisdiction and entitled to its aid only by dispensing with personal notice to those out of it, and substituting instead what is possible for notice to them, it is powerless to do this, and so, powerless to help its own citizens or strangers within its gates, however strong may be their claims or their necessities. Such a sacrifice of substance to shadows, of the purposes to the forms of justice, might mark the ordinances of a petty municipality, but could hardly be supposed to characterize the system of general law.

Now, marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than "fatherhood" or "sonship" is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which it resembles in this, that it is formed by contract. To this relation there are two parties, as to the others, two or more, interested without doubt in the existence of the relation, and so interested in its dissolution. These parties are placed by the relation in a certain relative state or condition, under the law, as are parents and children, masters and servants; and as every nation and State has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the person domiciled within that territory. It may, except so far as checked by constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties, or abrogate them, and so the legal obligation of the

relation which involves them, altogether. This it may do, with the exception above stated, as in some relations, by law, when it wills; declaring that the legal relation, of master and slave, for instance, shall cease to exist within its jurisdiction, or for what causes or breaches of duty in the relation, this, or the legal relation of husband and wife, or of parent and child, may be restricted in their rights and duties or altogether dissolved through the judicial intervention of its courts. The right to govern and control persons and things within the State, supposes the right, in a just and proper manner, to fix or alter the status of the one, and to regulate and control the disposition of the other; nor is this sovereign power over persons and things lawfully domiciled and placed within the jurisdiction of the State diminished by the fact that there are other parties interested through some relation, in the status of these persons, or by some claim or right, in those things, who is out of the jurisdiction, and cannot be reached by its process. No one doubts this, as a matter of general law, with regard to the other domestic relations, and what special reason is there to doubt it, as to the relation of husband and wife? The slave who flees from Virginia to Canada, — no treaty obliging his restoration — or who is brought by his master thence to a free State of the Union — no constitutional provision enforcing his return — finds his status before the law in the new jurisdiction he has entered changed at once; and no one dreams that this result of a new domicile and the new laws of it, is less legally certain and proper as a matter of general law, because the master is out of the new jurisdiction of his slave, and is not, or cannot be cited to appear and attend to some formal ceremony of emancipation. It is true that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race, and, as a relation, is nowhere so restrictive and so binding in its obligations as amongst the most truly civilized portions of it. Yet each nation and state has its peculiar law and policy as to the mode of forming, and the mode and causes for judicially dissolving this last relation, according to its right; and all that other States or nations, under the general law which pervades all Christendom can properly demand is, that in the exercise of its clear right in this last respect as to its own citizens and subjects, it should pay all, and no more attention, than is practicable to the competing rights and interests of their citizens and subjects. It should give the non-residents and foreigners, parties to such a relation of general legal sanctity as to persons of the like description interested in property within its territory, the rights to which are also everywhere recognized, at least such notice by publicity before it proceeds to judicial action, as can, under such circumstances, be given consistently with any judicial action at all efficient for the purposes of justice. To say that the general law inexorably demands personal notice in order to such action, or, still worse, demands that all parties interested in a relation or in property subject to a jurisdiction should be physically within that jurisdiction, is to lay

down a rule of law incapable of execution, or to make the execution of laws dependent not upon the claims of justice, but upon the chance locality, or, what is worse, upon the will of those most interested to defeat it.

It is evident, upon examining the statutes of the different States of the Union, that legislation vesting jurisdiction for divorce in their courts has followed no principle of general law in this respect whatsoever; some statutes making the jurisdiction, or supposing it to depend upon the place of the contract, some upon the place of the *delictum*, and some, as in this State, and as they should do, upon the domicile of the wronged and petitioning party. The courts of each State exercise, as they must, jurisdiction upon the principles laid down for them by statute; and have very little occasion, unless called upon to review the decree of some neighboring State, to attend to or consider any general principles pertaining to the subject. Engaged in this latter task, they are very apt to confound the statute principles of jurisdiction, to which they are accustomed, with the principles of general law relating to it; notwithstanding the latter so obviously grow out of the right of every State to regulate, in some cases by law, and in others by proper judicial action, according to the nature of the subject, the social condition or status, as it is called, of all persons subject to its jurisdiction. A singular instance of forgetfulness of this principle of "State sovereignty" is afforded by the case of *Hull v. Hull*, 2 Strobhart's Equity Appeals, 174: in which the right of the State of Connecticut to dissolve through its courts under the law of that State, a marriage there formed between two of its own citizens, upon the petition of a wife whose husband had deserted her and her children and settled in South Carolina, constructive notice only having been given to the absent and absconding husband, was put upon the ground that dissolution of the contract of marriage upon such notice was part of the law of the place of the contract and so part of the contract itself. The courts of that State, it seems, whilst forgetting the State rights of their northern sister, strenuously insist upon the rights of their own; holding, according to the exploded notion of *Lolley's Case*, or rather of *McArthy v. McArthy*, that a South Carolina marriage cannot be dissolved out of the State of South Carolina, although any other may. In *Irby v. Wilson*, 1 Dev. & Bat. Eq. R. 568, 576, under similar circumstances, except that in this case the wife was the deserting, and the husband the petitioning party, the Supreme Court of North Carolina held that a Tennessee divorce was void, upon the ground hinted at in *Lyon v. Lyon*, sup., to wit, that such a proceeding being between parties, and the wife having been constructively notified only, although such notice was all that was possible, the courts of Tennessee could not alter by way of redress the status of one of its own citizens become burdensome to him by the alleged causeless and continued desertion of his wife. Upon the same principle, and for the same reason, of course, North Carolina could not relieve from the relation its citizen, the wife, although her husband might have com-

pelled her to flee from him to the only home open to her in that State, by the grossest violation of the duties which their relation to each other imposed; and thus, both these conterminous sovereignties would be powerless for justice, over and upon the call of its respective domiciled inhabitant. In Pennsylvania, the jurisdiction is made to depend upon jurisdiction over the offender at the time of the offence (*Dorsey v. Dorsey*, 7 Watts, 349), as if the *lex loci delicti* were to govern; in Louisiana, upon like jurisdiction, unless the marriage were contracted within the State, when, we suppose, the *delictum* would be regarded as a breach of contract, if such by the law of Louisiana in which the contract was entered into. *Edward v. Green*, 9 La. Ann. R. 317. Thus, we perceive, that by some courts marriage is treated as a species of continuing executory contract between the parties, the obligations of which, and the causes and even modes of dissolving which, are fixed by the law of the place of contract. So sacredly local is it, in the view of some, that it cannot be dissolved but by the courts of the country in which it was formed. Others, perceiving, that though a contract, it is one universally recognized, acknowledged the right of foreign tribunals to act upon it, provided that in doing so, they govern themselves not by the only law which they, it may be by statute, can administer, but ascertain whether it has been broken, and so ought to be dissolved, by the law of the place of the contract. Some treat breaches of the contract of every degree as *quasi* crimes, to be punished only in the place in which they were committed, provided the parties be then there domiciled; and others, again, qualify this by an exception in favor of the tribunals of the place of contract; since there the *delicta* can be treated as breaches of the contract, if such be the law of the place of contract. If marriage be a contract, or the breach of it a tort, it may well be asked, why are they not at least personal in their nature, and transitory in their legal character? passing with the wronged person wherever he or she passes, for redress by any tribunal of the civilized world, which can obtain jurisdiction of the person of the covenant breaker or trespasser?

It is evident that from such confusion of decisions and reasons, no general principle worth considering can, by any process, be eliminated. Raising ourselves above this mist of misapplied learning and ingenuity, and looking at the matter simply as it is, it is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized State, and certainly every State in this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister, States; that a State cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other States, as related to them,

are interested in that status, and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether *a mensa et thoro* or *a vinculo matrimonii*, the general law does not deprive a State of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners, or domiciled inhabitants of other States have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions; the purpose of such notice being to banish the idea of secrecy and fraud in the proceeding by inviting publicity to it, as well as to give to persons out of the jurisdiction of the court every chance possible, under the circumstances, of appearing to the proceeding, and defending, if they will, their own rights and interests involved in it.

These views are supported by the practice of the States of Connecticut and Tennessee called in question, as we have seen by the courts of South and North Carolina, as probably by the practice of many other States, and certainly by the long continued practice of our own. They are sanctioned by the well-considered decision of *Harding v. Alden*, 9 Greenl. R. 140, and by that learned juriconsult, the late Chancellor Kent, in his note on that case, 2 Kent's Com., 110, n. b, 4th ed. They are otherwise best sustained by authority. *Tolen v. Tolen*, 2 Blackf. 407. *Guembell v. Guembell*, Wright, 286. *Cooper v. Cooper*, 7 Ohio, 238. *Mansfield v. McIntyre*, 10 ib. 27. *Harrison v. Harrison*, 19 Alabama, 499. *Hare v. Hare*, 10 Texas, 355. See also the whole subject discussed in Bishop on Marriage and Divorce, *passim*, and especially in ch. 34 of that valuable work.

It may be added, that the distressing consequences which otherwise might arise from the conflict of laws and decisions upon this interesting and important subject has been wisely provided against by a clause of the Constitution of the United States, and can find a remedy under it in the Supreme Court of the United States, as the court of last resort, in cases demanding its application. By art. 4, sect. 1, of the Constitution of the United States, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." As this has been construed by the highest authority to give in every other State the same effect to a judgment or decree of a State court that it has in that in which it is rendered or passed, no serious injury can be done to the proper subjects of our judicial administration by the errors and mistakes of other courts with regard to our

jurisdiction. From the nature of the topics constantly agitated before it, no court in the world is better qualified to deal with questions of general law, and especially with one involving, as that before us does, the rights of a State of the Union; and under the trained qualifications of the members of the court, as well as the constitutional power of the court itself, those properly subject to our judgments and decrees in this respect, as in all others, are quite safe, having honestly obtained them, in acting by virtue of them.<sup>1</sup> . . .

We reserved this case, the first on the circuit which presented the question before discussed for consideration, it being admitted that the husband of the petitioner had never resided with her in this State, or even as the proof showed, been within its borders, and was now abroad in parts unknown, and was not, of course, personally served, because under such circumstances he could not be personally served with the ordinary citation issued by us to a resident defendant to such a petition. Under the authorized rule of this court, in regard to constructive notice to an absent defendant to a petition for divorce, upon affidavit of the facts, six weeks' notice of the pendency of this petition was given, by publishing the same for the space of six weeks next before the sitting of the court at this term; and it is evident that the husband of this lady knows, as from his conduct it is apparent that he cares, nothing about this proceeding. Whatever was the former domicile of the petitioner, we are satisfied that she is, and has, for upwards of the last three years, been a domiciled citizen of Rhode Island, — her only home, in the house of her father; and that, as such citizen, and upon such notice, we have power and jurisdiction over her case, and to change her condition from that of a married to that of a single woman, granting to her the relief, which, under like circumstances, the law and policy of Rhode Island accords to all its citizens. Let a decree be entered divorcing Mary Ann Ditson from George L. Ditson, and annulling the bond of matrimony now subsisting between them; and that the name of the said Mary Ann Ditson be changed to, and she be hereafter known and called by the name of Mary Ann Simmons, according to the prayer of her petition.<sup>2</sup>

<sup>1</sup> Here follows a discussion of the question of domicile, for which see *s. c. supra*, p. 205. — Ed.

<sup>2</sup> *Acc.* Cheever v. Wilson, 9 Wall. 108; Hanberry v. Hanberry, 29 Ala. 719; Chapman v. Chapman, 129 Ill. 386; Harden v. Alden, 9 Me. 140; Shreck v. Shreck, 32 Tex. 578; Hubbell v. Hubbell, 3 Wis. 662; Stevens v. Fisk (Can.), 8 L. N. 42. See Rhyns v. Rhyns, 7 Bush. 316; Harteau v. Harteau, 14 Pick. 81; Frary v. Frary, 10 N. H. 61.

In Massachusetts the court at the domicile of either spouse is competent, at the election of the libellant. Sewall v. Sewall, 122 Mass. 156; Watkins v. Watkins, 135 Mass. 83. In Pennsylvania the court of the libellee's domicile alone is competent, unless the libellee has changed his domicile since cause for divorce given. Colvin v. Reed, 55 Pa. 375; Reel v. Elder, 62 Pa. 308. In several States, the court of the libellant's domicile alone is competent: Irby v. Wilson, 1 Dev. & B. Eq. 568; White v. White, 18 R. L. 292, 27 Atl. 506; Dutcher v. Dutcher, 39 Wis. 651. — Ed.

STATE *v.* ARMINGTON.

SUPREME COURT OF MINNESOTA. 1878.

[Reported 25 Minnesota, 29.]

THE defendant was tried in a district court for the crime of polygamy. He offered in evidence a certified copy of a decree of divorce between himself and his former wife, granted by a Probate Court in Utah. This was excluded by the court on the ground that both parties were at that time resident in Minnesota: the defendant excepted. The defendant was convicted and sentenced to the state prison for two years, and appealed.<sup>1</sup>

CORNELL, J. The remaining question for consideration relates to the decision of the court excluding what purports to be an authenticated copy of a decree of divorce of the "probate court in and for Box Elder county, in the territory of Utah," entered in that court at a special term, on December 18, 1876, in an action between John L. Armington, plaintiff, *v.* Martha F. Armington, defendant, dissolving the marriage contract between them. Among the objections made to this evidence, was the one that, at the time the decree purports to have been rendered both parties thereto were residents of this State, and had been for several years prior. When this evidence was offered, it incontestably appeared, from the testimony already given, that both the defendant and his said wife, Mrs. Martha F. Armington, had been resident citizens of this State, and domiciled therein, for over nine years prior to the date of the decree, and that they were both actually living in this State at the time of its entry. It did not appear, nor was any offer made to show the fact, that either had ever been domiciled, even temporarily, within the territory of Utah; and as to Mrs. Armington, it is quite clear that she never, at any time during the progress of the proceedings in said court, was outside the limits of this State, or within the territorial limits of Utah. As to Mr. Armington, the most that can be claimed from the evidence is that he temporarily left his residence in Northfield, in this State, sometime in the summer of 1876, and returned in August or September of that year. Where he was, during this period, does not affirmatively appear: but it does affirmatively appear that he has resided and practised medicine in Northfield ever since November in that year. Upon this evidence, the court was warranted in assuming that neither of the parties ever acquired a *bona fide* domicile or residence in Utah, and that both were, during the conduct of these divorce proceedings, domiciled residents of this State, and subject to its laws. Upon this state of facts, the probate court of Utah, whatever may have been the extent of its jurisdiction over the subject of divorce under the local laws of that territory as respects its citizens, had no

<sup>1</sup> This short statement of the facts necessary for the question of jurisdiction is substituted for the statement of the Reporter. Part of the opinion only is given. — Ed.

jurisdiction to adjudicate upon the marriage relation existing between these parties. To each State belongs the exclusive right and power of determining upon the status of its resident and domiciled citizens and subjects, in respect to the question of marriage and divorce, and no other State, nor its judicial tribunals, can acquire any lawful jurisdiction to interfere in such matters between any such subjects, when neither of them has become *bona fide* domiciled within its limits; and any judgment rendered by any such tribunal, under such circumstances, is an absolute nullity. *Ditson v. Ditson*, 4 R. I. 93; *Cooley Const. Lim.* 400, and notes; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30; *Hanover v. Turner*, 14 Mass. 227. It does not appear upon the face of the judgment or decree, or in any of its recitals, that either of the parties were ever residents of said territory of Utah, or domiciled therein. This is a jurisdictional matter, which should appear, to entitle the judgment to any respect whatever; for though it be conceded that the probate court that rendered the judgment was in the legal sense a court of record, "its jurisdiction," if any, under the local laws of the territory, "over the subject of divorce, was a special authority not recognized by the common law, and its proceedings in relation to it stand upon the same footing with those of courts of limited and inferior jurisdiction," unaided by any legal presumptions in their favor. *Com. v. Blood*, 97 Mass. 538. The evidence was properly excluded.<sup>1</sup>

### PEOPLE v. BAKER.

COURT OF APPEALS, NEW YORK. 1879.

[Reported 76 *New York*, 78.]

FOLGER, J. As we look at this case, it presents this question: Can a court, in another State, adjudge to be dissolved and at an end, the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there.

<sup>1</sup> *Acc. Harrison v. Harrison*, 20 Ala. 629; *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841; *Hood v. S.*, 56 Ind. 263; *Litowich v. Litowich*, 19 Kan. 451; *Thelau v. Thelau*, 75 Minn. 433, 78 N. W. 108; *Smith v. Smith*, 19 Neb. 706, 28 N. W. 296; *Firth v. Firth*, 50 N. J. Eq. 137, 24 Atl. 916; *Van Fossen v. S.*, 37 Oh. S. 317. This being a jurisdictional question, a finding by the court that the libellant is domiciled will not give it jurisdiction, nor will a recital of domicile in the judgment render it valid. *P. v. Dawell*, 25 Mich. 247. This doctrine is applied, even if the non-residents were still subjects of the country which granted the divorce. *St. Sure v. Lindsfelt*, 82 Wis. 346, 52 N. W. 308.

A *bona fide* temporary residence, without domicile, in a State is not enough to give its courts jurisdiction. *Winship v. Winship*, 16 N. J. Eq. 107.

A court of the State where the parties are domiciled has jurisdiction, though the cause of divorce arose elsewhere: *Jones v. Jones*, 67 Miss. 195, 6 So. 712; and though the motive for acquiring the domicile was to take advantage of the loose laws of divorce: *Colburn v. Colburn*, 70 Mich. 647, 38 N. W. 607. — Ed.



without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State.

We assume, in putting this proposition, that the defendant in error was in the situation therein stated. We think that it may properly be thus assumed. It is true, that the first which is disclosed of the defendant in error, by the error-book, shows him in another State, in the act of marriage with Sallie West, the other party in the judicial proceedings there held. It does not appear where his domicile then was, nor where it had been. After the marriage, however, the persons then married resided at Rochester, in this State, at a time prior to the commencement of those judicial proceedings; and he continued to reside in that city until in 1875, and after the final judgment therein was rendered. We look in vain in the error-book for any exception, proposition, or suggestion, which presents or indicates, that the case was tried at the sessions, upon the theory or contention that the defendant in error was domiciled in Ohio, or temporarily abiding there, at any time during the pendency of the judicial proceedings in that State.

We come back then to the question we have above stated. We are ready to say, that as the law of this State has been declared by its courts, that question must be answered in the negative. The principle declared in the opinions has been uniform. Such is the utterance in *Borden v. Fitch*, 15 J. R. 121; *Bradshaw v. Heath*, 13 Wend. 407; *Vischer v. Vischer*, 12 Barb. 640; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 id. 30. Nor does it avail against them to say that the facts of those cases do not quadrate exactly with those of the case before us. The utterances which we speak of were not inconsiderate expressions, nor dicta merely. They were considerate steps in the reasoning, leading to the solemn conclusion of the court. And as touching the question in its general relations, we may cite *Kilburn v. Woodworth*, 5 J. R. 37; *Shumway v. Stillman*, 4 Cow. 292; S. C. 6 Wend. 447; and *Ferguson v. Crawford*, 70 N. Y. 253, where the whole subject is elaborately considered. We know of no case in our courts which has questioned the principle declared in these authorities. *Kinnier v. Kinnier*, 45 N. Y. 535, — sometimes claimed to be a departure, — does not. It is recognized there, that to make valid in this State a judgment of divorce, rendered by a court of another State, that court must have “the parties within its jurisdiction,” must “have jurisdiction of the subject-matter and of the parties,” who “must be within the jurisdiction of the court.” *Hunt v. Hunt*, 72 N. Y. 217, does not. That case was close. It went upon the ground, built up with elaboration, that both parties to the judgment were domiciled in Louisiana when the judicial proceedings were there begun and continued and the judgment was rendered, and were subject to its laws, including those for the substituted service of process. We meant to keep the reach of our judgment within the bounds fixed by the facts in that case.

We must and will abide by the law of this State, as thus declared, unless the adjudications in which it has been set forth have been authoritatively overruled in that regard. As this is a question of Federal cognizance, we ought to inquire whether the national judiciary has declared anything inconsistent therewith. *Cheever v. Wilson*, 9 Wall. 108, is cited. Clearly that case is not applicable. There both the parties to the judgment made a voluntary appearance, and the divorce court had jurisdiction of their persons, as it had of the subject-matter. "It had jurisdiction of the parties, and the subject-matter," says the opinion in the case cited. It had jurisdiction of the plaintiff in the divorce proceedings, by her voluntary appearance in court, as a petitioner, and showing a *bona fide* residence in that State, in the way fixed therefor by its statute law. It had jurisdiction of the person of the defendant by his voluntary appearance in the court, and putting in a sworn answer to the petition. The dictum in the case of *Pennoyer v. Neff*, 95 U. S. 714, even had it the force of a judgment, does not go to the extent needed to overrule these decisions in our State. It is there held, that to warrant a judgment *in personam*, there must be personal service of process, or assent in advance to a service otherwise. It is also said that a State may authorize judicial proceedings to determine the status of one of its own citizens towards a non-resident, which will be binding within the State, though had without personal service of process or appearance. It is not said, much less is it authoritatively decided, that a judgment thus got may do more than establish the status of the parties to it, within the State in which the judgment is rendered. The case just cited is the latest annunciation known to us of the Supreme Court of the United States. It does not overrule the declarations of our own courts. It rather sustains them. We must and do concede that a State may adjudge the status of its citizen towards a non-resident; and may authorize to that end such judicial proceedings as it sees fit; and that other States must acquiesce, so long as the operation of the judgment is kept within its own confines. But that judgment cannot push its effect over the borders of another State, to the subversion of its laws and the defeat of its policy; nor seek across its bounds the person of one of its citizens, and fix upon him a status, against his will and without his consent, and in hostility to the laws of the sovereignty of his allegiance.

It is said, that a judicial proceeding to touch the matrimonial relation of a citizen of a State, whether the other party to that relation is or is not also a citizen, is a proceeding *in rem*, or, as it is more gingerly put, *quasi in rem*. But it was never heard that the courts of one State can affect in another State the *rem* there, not subjected to their process, and over the person of the owner of which no jurisdiction has been got. Now, if the matrimonial relation of the one party is the *res* in one State, is not the matrimonial relation of the other party a *res* in another State? Take the case of a trust, the subject of which is lands in several States, the trustees all living in one State. Doubtless the

courts of a State in which the trustees did not live and never went, but in which were some of the trust lands, could proceed *in rem* and render a judgment without personal service of process, which would determine there the invalidity of the trust and affect the possession and title of the lands within the jurisdiction of those courts; but it would not be contended that the judgment would operate upon the trustees or the trust lands in other States, so as to affect the title or the possession in those States. It could operate only on the *rem* upon which the process of those courts could lay hold. And why is not the matrimonial relation of a citizen of New York, as it exists in that State, if it is a *res*, as much exempt from the effect of such a judgment as lands in that State, and the trust under which they may be held? Is not any other relation of mankind as much a *res* for the touch and adjudication of courts as that of husband and wife? Take the relation of a minor orphan to its guardian, or to those entitled by law to be its guardians. That is a status, in kind as the matrimonial relation. The courts of one State may act and appoint a guardian for such a child, if it is within their territorial jurisdiction and remains there; but the appointment is not operative *per se* in another State into which the child goes. *Woodworth v. Spring*, 4 Allen, 321. It is, of course, to be granted, as before said, as a general proposition, to which it is not now needful to suggest limitations, that each State may declare and adjudge the status of its own citizens. And hence if one party to a proceeding is domiciled in a State, the status of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed, in accordance with the laws of that State. But has not the State in which the other party named in the proceedings is domiciled, also the equal right to determine his status, as thus affected, and to declare by law what may change it, and what shall not change it? If one State may have its policy and enforce it, on the subject of marriage and divorce, another may. And which shall have its policy prevail within its own borders, or shall yield to that of another, is not to be determined by the facility of the judicial proceedings of either, or the greater speed in appealing to them. That there is great diversity in policy is very notable. It does not, however, seem to tend to a state of harmonious and reliable uniformity, to set up the rule that the State in which the courts first act shall extend its laws and policy beyond its borders, and bind or loose the citizens of other sovereignties. It will prove awkward, and worse than that, afflictive and demoralizing, for a man to be a husband in name and under disabilities or ties in one jurisdiction, and single and marriageable in another. Yet it is only in degree that it is harder than the results of other conflicts in laws. It is more sharply presented to us, because tenderer, more sacred, more lasting relations, of greater consequence, are involved; and because the occasions calling attention to the conflict have, of late years, become so frequent. Whatever we may hold in the United States, it will not change results in foreign countries. And in seek-

ing for a rule which shall be of itself, from its own reason, correct, we ought to find or form one, if may be, that is generally applicable. However submissively we must concede to every sovereignty the right to maintain such degree of strictness in the domestic relations as it sees fit, within its own territory, there is no principle of comity which demands that another sovereignty shall permit the status of its citizens to be affected thereby, when contrary to its own public policy, or its standard of public morals.

We are not, therefore, satisfied with the doctrine that rests the validity of such judicial proceedings upon the right and sovereign power of a State to determine the status of its own citizens, and because it may not otherwise effectually establish it, asserts the power to adjudge upon important rights, without hearing the party to be affected, and without giving him the notice which is required by the principles of natural justice, he being all the while beyond its jurisdiction.

Besides, a just consideration of what is a proceeding *in rem*, and of the effect of a judgment therein, shows that the latter does not reach so far as is contended for it. It is a proceeding *in rem* merely. The judgment therein is not usually a ground of action *in personam* in another jurisdiction, for, as a proceeding *in personam*, or as giving foundation for one, the court gets no jurisdiction. *Pauling v. Bird's Exrs.*, 13 J. R., 192. How then, upon such basis, can the judgment be brought here and made the foundation of an action against one personally; and if not a means of offence *in personam*, how a means of defence to the person, when sought to be held for personal acts, in violation of the laws of his allegiance?

The consequences of such want of harmony in polity and proceeding, we have adverted to. The extent of them ought to bring in some legislative remedy. It is not for the courts to disregard general and essential principles, so as to give palliation. Indeed, it is better, by an adherence to the policy and law of our own jurisdiction, to make the clash the more and the earlier known and felt, so that the sooner may there be an authoritative determination of the conflict.

It is urged upon us that our State cannot with good grace hold invalid this judgment of a court of Ohio, when our own Code provided, at the time of the rendition of it, for the giving of judgment of divorce against a non-resident, by like substituted service. It is true that, until the new Code of Procedure, such had been the case. 2 R. L. 197, § 1; 1 id. 489, § 9; 2 R. S. 144, § 38; id. 185; id. 187, § 134; Laws of 1862, chap. 246, § 1; Old Code, § 135; but see New Code, § 438, sub. 4. This is but to say that, on the principle of the comity of States, we should give effect to this judgment. But this principle is not applied, when the laws and judicial acts of another State are contrary to our own public policy, or to abstract justice or pure morals. The policy of this State always has been, that there may of right be but one sufficient cause for a divorce *a vinculo*; and that policy has been upheld, with strenuous effort, against persistent struggles of indi-

viduals to vitiate and change it. And though it is lightly, we must think, sometimes said that it is but a technicality, that there must be personal notice and chance to be heard, to make a valid judgment affecting personal rights and conditions, we cannot but estimate the principle as of too fundamental and of too grave importance, not to be shielded by the judiciary, as often as it is in peril.

We are aware that there are decisions of the courts of sister States to the contrary of the authorities in this State. They are ably expressed; they are honestly conceived. They are, however, on one side of a judicial controversy, the dividing line whereof is well marked, and is not lately drawn. It would not be profitable to review and discuss them. They are prevalent within the jurisdictions in which they have been uttered, and we cannot expect to change them there. They are in opposition to the judgments of our own courts, which we must respect, and with which our reason accords. It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process shall be operative without the territorial jurisdiction of the tribunal giving it.

There is an exception still to be noticed. The court, in charging the jury, stated to them that, if the divorce had been obtained under the laws of this State, though the defendant in error would not have been guilty of the crime of bigamy, yet he would have been guilty of a misdemeanor, and that that was a pertinent consideration for them. We do not understand that this was meant for an instruction that they could convict him of the misdemeanor, if they did not find that he was guilty of the higher offence. The charge is to be taken in connection with the reception in evidence of the Ohio record, on the question of his intent. As bearing merely upon his guilty or innocent purpose, it was not inappropriate for the jury to consider that though a man, from whom his wife has been divorced *a vinculo*, in this State may not, by marrying again, incur the penalties for bigamy, he does violate the decree which forbids to him another marriage so long as she lives.

We are of opinion that the judgment of the General Term should be reversed, and that of the Sessions be affirmed.

All concur, except CHURCH, Ch. J., dissenting.

*Judgment accordingly.*<sup>1</sup>

<sup>1</sup> *Acc.* Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933; and see Harris v. Harris, 115 N. C. 587, 20 S. E. 187; Doerr v. Forsythe, 50 Oh. S. 726, 35 N. E. 1055. In Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, CARTER, J., said of the principal case: "The consequence was that the wife was, and on removing to New York would continue to be, a single woman, who might lawfully marry; while the husband was a married man, having for his wife one who might at the same time become or be the lawful wife of another man. We cannot regard as sound a doctrine leading to such results. We are unable to see the force of the reasoning which is used to support judicial conclusions that one of the married pair may, in one jurisdiction, by virtue of its laws, and in honest compliance with them, obtain a valid decree of divorce, which, as to the one obtaining it, is valid and binding in every State in the Union, leaving

## TURNER v. THOMPSON.

HIGH COURT OF JUSTICE, PROBATE DIVISION. 1888.

[*Reported 13 Probate Division, 37.*]

SIR JAMES HANNEN, PRESIDENT. The facts of this case are as follows: The petitioner, Georgiana Turner, was a British subject, domiciled in England, and, on November 7, 1872, she married, in England, the respondent, who is a citizen of the United States, domiciled there. He was in the United States marine service, and he was from time to time engaged professionally away from his wife; but they met and cohabited together at various places in the United States and elsewhere. In 1879 she instituted proceedings in the United States for a decree dissolving the marriage on the ground of her husband's incompetency; the form of decree in the United States being a dissolution of marriage, and not, as in this country, a declaration that the marriage was null and void. That is a mere difference in form. The marriage was accordingly dissolved, and she has now returned to England to institute proceedings here for the purpose of having her marriage declared null and void. The case came before my brother Butt, and he raised the question whether there was anything on which this court could proceed, and whether this court has any jurisdiction, because, of course, if the marriage were absolutely dissolved by the court in the United States, then there exists no marriage between the parties upon which this court can be called on to pronounce an opinion. Mr. Justice Butt ordered the case to be argued by the Queen's Proctor, and it now comes before me.

I am of opinion that this court has no jurisdiction, in the sense I have already mentioned; that is, that the marriage was totally and absolutely dissolved by the decree of the court in the United States; and therefore that there is no marriage between the parties, which could be dissolved or declared null and void by this court.

such a one single, and free to remarry in any State, while the matrimonial bonds are still unsevered as to the other party, making him a bigamist should he remarry, and his children, the fruit of such remarriage, illegitimate. It would seem to be as logical to say that one of the Siamese twins might have been severed from the other without that other being severed from the one. It should not be forgotten that it is the policy of a great majority of the States, and of our own State as well, as established by legislative enactments, to grant judicial decrees of divorce to *bona fide* residents who comply with the statutory requirements where substituted service merely is had upon the non-resident party. To hold such decrees valid only within the jurisdiction granting them, or valid only as to those in whose favor they are granted, leaving the non-resident party still bound, would not only be inconsistent with the policy of our own laws, and in violation of interstate comity, but would, when it is considered how great is the number of such decrees entered every year, eventually lead to the most perplexing and distressing complication in the domestic relations of many citizens in the different States."

The marriage, though it took place in England, must, no doubt, according to the decision in *Harvey v. Farnie*, 8 App. Cas. 43, which went up to the House of Lords, be taken to be *prima facie* an American marriage, because the husband was domiciled in the United States, and *prima facie* the courts of the place of his domicile had jurisdiction in the matter. If the parties had remained in England, then, under some circumstances, the case of *Niboyet v. Niboyet*, 3 P. D. 52, is an authority for saying that the courts of this country would have jurisdiction. But, as a matter of fact, these parties after the solemnization of the marriage went to the United States and there took up their permanent abode. I am of opinion that the wife did completely acquire a domicile in the United States. I know it is alleged on her behalf that that is not so. It is said she was by origin a British subject, and as by the law of England the matter in dispute between her and her husband would have been disposed of in the form of a declaration that the marriage was null, she therefore was entitled to treat the marriage as null and void from the beginning, so that she never lost her English domicile at all. The fallacy which underlies that argument appears to me to be evident from this. A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicile of her husband if she lives with him in the country of his domicile. There is no ground here for contending that she did not take up that domicile. She had the intention of taking up her permanent abode with him, and of making his country her permanent home. It is to be remembered that a marriage by the law of England, when one of the parties is incompetent, is not a marriage absolutely void, but only voidable at the instance of the injured party. If she had thought fit she might have remained a wife, enjoying all the advantages of a wife, save that of a marital intercourse. It was only in 1879, the marriage having taken place in 1872, that she instituted proceedings for getting that marriage put aside.

I am of opinion that at the time of the institution of that suit, which is the turning point of the proceeding, her domicile was, in fact and in law, in the United States: therefore the United States courts had jurisdiction in the matter, and upon this ground I think the petition must be dismissed.

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### CUMMINGTON v. BELCHERTOWN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1889.

[Reported 149 *Massachusetts*, 223.]

DEVENS, J. Mrs. Angie L. Richards, the expenses of whose support as an insane pauper are here in controversy, had, as Angie L. Root, a legal settlement in the defendant town at the time of her marriage. She acquired one in the plaintiff town by her marriage, on June 10,

1873, with Charles A. Richards, who was there settled. Milford v. Worcester, 7 Mass. 48. It is the contention of the plaintiff, that, the marriage of the pauper having been legally annulled as having been procured by fraud, her settlement in Cummington thus gained is destroyed, and that in Belchertown is revived, it having been suspended only during the *de facto* existence of the marriage.

It was held in Dalton v. Bernardston, 9 Mass. 201, that a woman acquiring a settlement by her marriage under the St. of 1793, c. 34 (Pub. Sts. c. 83, § 1, cl. 1), did not lose her settlement by a divorce, except for a cause which would show the marriage to have been void. In the latter case, there would have been no such marriage as the statute intended as the means of acquiring a settlement. Assuming that the law would be the same where a marriage not originally void, but voidable on the ground of fraud, or for any other reason, was declared void, we consider the question whether the plaintiff has shown any sufficient evidence of a decree annulling the marriage by which the defendant or others collaterally affected by the marriage or the dissolution of it would be bound. If the pauper herself would not be bound by such a decree, it is quite clear that the defendant would not be, whether the marriage was absolutely void or voidable only. Not being a party to the decree, and unable, therefore, to take any steps to reverse it, the defendant is not precluded from showing in a collateral proceeding that the decree was erroneous, or that it has no effect such as the plaintiff claims for it. The plaintiff contends that a decree valid as against the pauper, by which her marriage with Richards has been annulled, has been rendered by the Supreme Court of New York, having jurisdiction both of the subject-matter and of the parties.

It appeared that Richards and his wife lived together in this State for about a year and three months, when, in October, 1874, Mrs. Richards was adjudged insane, and legally committed to the lunatic hospital in Northampton, where she remained, with the exception of short intervals of time during which she was in the custody of her parents, until September 20, 1877, when she was again and finally committed to the hospital, and has remained, and now remains, hopelessly insane. Richards never cohabited with her after her first committal to the hospital; and at some time thereafter, but at what time does not appear, removed to the State of New York, without, however, any purpose of there obtaining a divorce, and without then having it in mind. On November 14, 1881, Richards, having only a short time before been informed for the first time that his wife had been insane before their marriage, commenced a proceeding in New York to have the marriage annulled, on the ground that he was induced to enter into it by fraud, and, after a notice to Mrs. Richards by a summons served upon her while an inmate of the Northampton Hospital, a decree annulling the marriage on the ground that the consent of Richards to the marriage was obtained by fraud was rendered on March 30, 1882. A transcript of the doings and record of, and testimony in, the Supreme Court, County of Fulton,



State of New York." was used at the trial in the Superior Court, and the decree there rendered was relied on by the plaintiff as establishing the fact of a legal dissolution of the marriage, by which the rights of the plaintiff and of the defendant would be affected in this Commonwealth.

While by the Constitution of the United States, Art. 4, § 1, full faith and credit are to be given to the judgments of other States, the jurisdiction of the courts rendering them is open to inquiry, both as regards the subject-matter of the controversy and the parties thereto. The recitals of the record are not conclusive evidence, and a party, or one affected collaterally by the judgment, may show that the court had no jurisdiction over the party such as it assumed to exercise. Mrs. Richards was, when the proceedings were commenced and concluded, an utterly insane woman. This not only appears by the finding of the Superior Court, but by all the proceedings of the New York court. It is averred in the petition addressed to it, and the allegations of the petition are found by the referee to whom the inquiries of fact were referred, and by that court, to have been true. It appears also by the return of the summons, and most clearly by the evidence taken before the referee. At no time did she, or any one on her behalf, appear before the referee or the court. Yet no guardian, next friend, or other person was appointed to represent her, and a decree annulling her marriage was rendered against a person whom the record and evidence showed to be insane, and whose rights were wholly unprotected. She had no actual residence in New York at any time. Her husband had abandoned her here on account of her insanity some time before he went to New York, had made no provision for her support, and she had always resided in this State, which was her domicile of origin.

That a decree of divorce rendered under similar circumstances of residence and condition of the wife in another State would not be recognized in the State of New York, or allowed in any way, directly or indirectly, there to affect any rights, whether of person or property, of the party against whom it had been made, appears clearly from its decisions. *People v. Baker*, 76 N. Y. 78; *Jones v. Jones*, 108 N. Y. 415. We shall not have occasion to consider what would be the effect that should be given here to a decree of divorce, under the circumstances above stated, if such had been rendered by the New York court. Such a decree necessarily implies the original existence of a lawful marriage. A decree annulling a marriage upon the ground that it was contracted under such circumstances that the party petitioning has a right to have it so annulled, stands upon quite different grounds. The validity of a marriage depends upon the question whether it was valid where it was contracted. To this rule there are but two exceptions: marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, and those marriages which the Legislature of the Commonwealth has declared shall not be valid because contrary to the policy of our own laws. *Commonwealth v. Lane*,

113 Mass. 458. Even when parties had gone from this Commonwealth into another State with intent of evading our own laws, and had there married, it was held reluctantly, in the absence of a statute declaring marriage solemnized there with such intent to be void here, that their validity must be recognized. *Medway v. Needham*, 16 Mass. 157; *Putnam v. Putnam*, 8 Pick. 433.

Without discussing the failure to appoint a guardian, the service in the case at bar on Mrs. Richards can have given the New York court no jurisdiction over her personally. To hold that her domicile might be changed to any other State by the act of her husband in removing thereto after he had abandoned her here and ceased to support her, and thus that she could be deprived of the protection in her marital rights, whether of person or property, which this State could extend to her, would be to use the legal fiction of the unity created by the marriage to her serious injury, and to work great injustice.

If the decree of the New York court is to have any validity here, it must be on grounds of comity. *Blackinton v. Blackinton*, 141 Mass. 432, 436. There can be no ground of comity which requires that we should recognize the decree of a New York court annulling a Massachusetts marriage between Massachusetts citizens, unless it had jurisdiction of both the parties; nor even if it did have such jurisdiction should it be recognized here, unless it was based upon grounds which are here held to be sufficient. Suppose two citizens of Massachusetts are married here, each of the age of eighteen years, have children, and then move to New York, where the husband obtains a decree of nullity on the ground that persons under the age of twenty-one years cannot lawfully marry. The children are not therefore rendered illegitimate in Massachusetts, so that they cannot here inherit their father's lands. Marriages between blacks and whites are still prohibited in some of the States, but a decree in such a State annulling a marriage of this character valid where contracted could not here be regarded. Illustrations of this sort, growing out of the different laws as to marriage in the several States, could readily be multiplied. The right of a State to declare the present or future status, so far as its own limits are concerned, of persons there lawfully domiciled, cannot be extended so as to enable it to determine absolutely what such status was at a previous time, and while they were subject to the laws of another State. The decrees of its courts in the latter respect must be subject to revision in the State where rights were then existing, or had been acquired. *Blackinton v. Blackinton*, 141 Mass. 432.

The cause alleged and found by the New York court was not sufficient to annul a marriage contracted in Massachusetts between its citizens according to the laws of this Commonwealth. Assuming that a marriage may here be declared void on account of fraud, and assuming that fraud is a cause which will enable the party defrauded to maintain a libel for the dissolution of the marriage which has thereby been procured, although the word "fraud," which is found in the Gen. Sts. c. 107,

§§ 4, 5, is omitted in the Pub. Sts. c. 145, § 11, no fraud was shown such as would enable a party here to avoid a marriage. Mrs. Richards was sane at the time of her marriage, and entirely competent to make the marriage contract; she had been insane at a previous period, but had recovered from such attacks, and the fact of such previous insanity was concealed from her husband by Mrs. Richards herself and her family, in the hope that marriage would prove beneficial to her health. She lived with her husband about a year and three months before symptoms of insanity again developed themselves. The possibility or probability that she might again become insane, growing out of the fact that she had previously been so, did not constitute such a fraud as entitled her husband to have the marriage dissolved.

There was no fraud of such a character as to affect the basis or the essential character of the contract. *Donovan v. Donovan*, 9 Allen, 140; *Foss v. Foss*, 12 Allen, 26. "It is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, although occasioned by disingenuous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage. . . . Therefore no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice." Bigelow, C. J., in *Reynolds v. Reynolds*, 3 Allen, 605.

Upon the ground, then, that the decree of the New York court attempts to annul a marriage contracted in Massachusetts between Massachusetts citizens, and thus affect the legal status of the woman who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court, and deprive her of the rights acquired by her marriage, and especially because it declares the marriage void for a reason on account of which, by the Massachusetts law, it cannot be avoided, we are of opinion that it should not be enforced here, and that no principle of interstate comity requires that we should give it effect.

For these reasons, a majority of the court are of opinion that the settlement acquired by Mrs. Richards by her marriage continues, and that judgment should be entered for the defendant.

*Judgment for the defendant.*<sup>1</sup>

<sup>1</sup> See *Linke v. Van Aerde*, 10 Times L. Rep. 426; *Roth v. Roth*, 104 Ill. 35; *Blumenthal v. Tannenholz*, 31 N. J. Eq. 194; *Johnson v. Cooke*, [1898] 2 Ir. 130. — Ed.

## HADDOCK v. HADDOCK.

SUPREME COURT OF THE UNITED STATES. 1906.

[*Reported 201 U. S. 562.*]

WHITE, J. The plaintiff in error will be called the husband and the defendant in error the wife.

The wife, a resident of the State of New York, sued the husband in that State in 1899, and there obtained personal service upon him. The complaint charged that the parties had been married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property. A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the State of Connecticut a divorce which was conclusive. At the trial before a referee the judgment roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, viz., desertion by the wife, was false. The referee sustained the objections and an exception was noted. The judgment roll in question was then marked for identification and forms a part of the record before us.

Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that the wife was a resident of the State of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband without justifiable cause abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of \$780 a year from the date of the judgment. The action of the referee was sustained by the Supreme Court of the State of New York, and a judgment for separation and alimony was entered in favor of the wife. This judgment was affirmed by the Court of Appeals. As by the law of the State of New York, after the affirmance by the Court of Appeals, the record was remitted to the Supreme Court, this writ of error to that court was prosecuted.

The Federal question is, Did the court below violate the Constitution of the United States by refusing to give to the decree of divorce rendered in the State of Connecticut the faith and credit to which it was entitled?

As the averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of State cognizance, we may not allow them to even indirectly influence our judgment upon the Federal question to which we are confined, and we, therefore, put these subjects entirely out of view. Moreover, as, for the purpose of the Federal issue, we are concerned not with the mere form of proceeding by which the Federal right, if any, was denied, but alone have power to decide whether such right was denied, we do not inquire whether the New York court should preferably have admitted the record of the Connecticut divorce suit, and, after so admitting it, determine what effect it would give to it instead of excluding the record and thus refusing to give effect to the judgment. In order to decide whether the refusal of the court to admit in evidence the Connecticut decree denied to that decree the efficacy to which it was entitled under the full faith and credit clause, we must first examine the judgment roll of the Connecticut cause in order to fix the precise circumstances under which the decree in that cause was rendered.

Without going into detail, it suffices to say that on the face of the Connecticut record it appeared that the husband, alleging that he had acquired a domicile in Connecticut, sued the wife in that State as a person whose residence was unknown, but whose last known place of residence was in the State of New York, at a place stated, and charged desertion by the wife and fraud on her part in procuring the marriage; and, further, it is shown that no service was made upon the wife except by publication and by mailing a copy of the petition to her at her last known place of residence in the State of New York.

With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous decisions of this court, and which are required to be borne in mind in analyzing the ultimate issue to be decided.

First. The requirement of the Constitution is not that some, but that full faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit clause that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. *Harding v. Harding*, 198 U. S. 317.

Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so

rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the State where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the State where rendered, the enforcement of such a judgment. *Pennoyer v. Neff*, 95 U. S. 714. The facts in that case were these: Neff, who was a resident of a State other than Oregon, owned a tract of land in Oregon. Mitchell, a resident of Oregon, brought a suit in a court of that State upon a money demand against Neff. The Oregon statutes required, in the case of personal action against a non-resident, a publication of notice, calling upon the defendant to appear and defend, and also required the mailing to such defendant at his last known place of residence of a copy of the summons and complaint. Upon affidavit of the absence of Neff, and that he resided in the State of California, the exact place being unknown, the publication required by the statute was ordered and made, and judgment by default was entered against Neff. Upon this judgment execution was issued and real estate of Neff was sold and was ultimately acquired by Pennoyer. Neff sued in the Circuit Court of the United States for the District of Oregon to recover the property, and the question presented was the validity in Oregon of the judgment there rendered against Neff. After the most elaborate consideration it was expressly decided that the judgment rendered in Oregon under the circumstances stated was void for want of jurisdiction and was repugnant to the due process clause of the Constitution of the United States. The ruling was based on the proposition that a court of one State could not acquire jurisdiction to render a personal judgment against a non-resident who did not appear by the mere publication of a summons, and that the want of power to acquire such jurisdiction by publication could not be aided by the fact that under the statutes of the State in which the suit against the non-resident was brought the sending of a copy of the summons and complaint to the post office address in another State of the defendant was required and complied with. The court said (p. 727):

“Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.”

And the doctrine thus stated but expressed a general principle expounded in previous decisions. *Bischoff v. Wethered*, 9 Wall. 812. In that case, speaking of a money judgment recovered in the Common Pleas of Westminster Hall, England, upon personal notice served in the city of Baltimore, Mr. Justice Bradley, speaking for the court, said (p. 814):

“It is enough to say[of this proceeding] that it was wholly without

jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law against property of the defendant there situate. it can have no validity here, even of a *prima facie* character. It is simply null."

Third. The principles, however, stated in the previous proposition are controlling only as to judgments *in personam* and do not relate to proceedings *in rem*. That is to say, in consequence of the authority which government possesses over things within its borders there is jurisdiction in a court of a State by a proceeding *in rem*, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. *Pennoyer v. Neff*, *supra*.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one State, conformably to the laws of such State, or the State through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. *Maynard v. Hill*, 125 U. S. 190. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicile in the Territory of Washington. Being there so domiciled, an act of the legislature of the Territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the Territory of Washington to recover real estate situated in the Territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs. Maynard had no notice and that she was not a resident of the Territory when the act was passed. From a decree of the Supreme Court of the Territory adverse to their claim the children brought the case to this court. The power of the territorial legislature, in the absence of restrictions in the organic act, to grant a divorce to a citizen of the Territory was, however, upheld, in view of the nature and extent of the authority which government possessed over the marriage relation. It was therefore decided that the courts of the Territory committed no error in giving effect within the Territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial

efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy.

Fifth. It is no longer open to question that where husband and wife are domiciled in a State there exists jurisdiction in such State, for good cause, to enter a decree of divorce which will be entitled to enforcement in another State by virtue of the full faith and credit clause. It has, moreover, been decided that where a *bona fide* domicil has been acquired in a State by either of the parties to a marriage, and a suit is brought by the domiciled party in such State for a divorce, the courts of that State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the full faith and credit clause. *Cheever v. Wilson*, 9 Wall. 108.

Sixth. Where the domicil of matrimony was in a particular State, and the husband abandons his wife and goes into another State in order to avoid his marital obligations, such other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated as the actual or constructive domicil of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired. This was clearly expressed in *Barber v. Barber*, 21 How. 582, where it was said (p. 595):

“The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessities nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers. . . .”

And the same doctrine was expressly upheld in *Cheever v. Wilson*, *supra*, where the court said (9 Wall. 123):

“It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife’s, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues.”

Seventh. So also it is settled that where the domicil of a husband is in a particular State, and that State is also the domicil of matrimony, the courts of such State having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the State of the matrimonial domicil for the purpose of the



dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the full faith and credit clause. *Atherton v. Atherton*, 181 U. S. 155.

Coming to apply these settled propositions to the case before us three things are beyond dispute: *a.* In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State. *b.* As New York was the domicile of the wife and the domicile of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicile of the wife continued in New York. *c.* As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicile in that State, and was not there individually domiciled and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicile of the wife within the State or as the result of personal service upon her within its borders.

These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicile of the husband in that State, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other States in and by virtue of the full faith and credit clause of the Constitution. In other words, the final question is whether to enforce in another jurisdiction the Connecticut decree would not be to enforce in one State, a personal judgment rendered in another State against a defendant over whom the court of the State rendering the judgment had not acquired jurisdiction. Otherwise stated, the question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a State to persons within its jurisdiction, but on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is therefore embraced, either within the letter or spirit of the doctrines stated in the third and fourth propositions?

Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject matter or of the person of the defendant, the courts of an-

other State are not required, by virtue of the full faith and credit clause of the Constitution, to enforce such decree. *National Exchange Bank v. Wiley*, 195 U. S. 257, 269, and cases cited.

I. The wide scope of the authority which government possesses over the contract of marriage and its dissolution is the basis upon which it is argued that the domicile within one State of one party to the marriage gives to such a State jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other States by force of the full faith and credit clause of the Constitution. But the deduction is destructive of the premise upon which it rests. This becomes clear when it is perceived that if one government, because of its authority over its own citizens has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government in virtue of its authority over marriage may dissolve the tie as to citizens of another government, other governments would have a similar power, and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed. To concretely illustrate: If the fact be that where persons are married in the State of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the State of Connecticut, there acquiring a domicile, and procure a dissolution of the marriage which would be binding in the State of New York as to the party to the marriage there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail. And conversely the like result would follow if the marriage had been celebrated in Connecticut and desertion had been from that State to New York, and consequently the decree of divorce had been rendered in New York. Even a superficial analysis will make this clear. Under the rule contended for it would follow that the States whose laws were the most lax as to length of residence required for domicile, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other States. In other words, any person who was married in one State and who wished to violate the marital obligations would be able, by following the lines of least resistance, to go into the State whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and public policy of the other States. Thus the argument comes necessarily to this, that to preserve the lawful authority of all the States over marriage it is essential to decide that all the States have such authority only at the sufferance of the other States. And the considerations just stated serve to dispose of the argument that the contention relied on finds support in the ruling made in *Maynard v. Hill*, referred to in the fourth proposition, which was at the outset stated. For in that case

the sole question was the effect within the Territory of Washington of a legislative divorce granted in the Territory to a citizen thereof. The upholding of the divorce within the Territory was, therefore, but a recognition of the power of the territorial government, in virtue of its authority over marriage, to deal with a person domiciled within its jurisdiction. The case, therefore, did not concern the extraterritorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the Constitution of the United States in another jurisdiction as to citizens of other States to whom the jurisdiction of the Territory did not extend.

The anomalous result which it is therefore apparent would arise from maintaining the proposition contended for is made more manifest by considering the instrument from which such result would be produced, that is, the full faith and credit clause of the Constitution. No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. No one, moreover, can deny that, prior to the adoption of the Constitution, the extent to which the States would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce. Yet, if the proposition be maintained, it would follow that the destruction of the power of the States over the dissolution of marriage, as to their own citizens, would be brought about by the operation of the full faith and credit clause of the Constitution. That is to say, it would come to pass that, although the Constitution of the United States does not interfere with the authority of the States over marriage, nevertheless the full faith and credit clause of that instrument destroyed the authority of the States over the marriage relation. And as the Government of the United States has no delegated authority on the subject, that Government would be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus neither the States nor the National Government would be able to exert that authority over the marriage tie possessed by every other civilized government. Yet, more remarkable would be such result when it is borne in mind that, when the Constitution was adopted, nowhere, either in the mother country or on the continent of Europe, either in adjudged cases or in the treatises of authoritative writers, had the theory ever been upheld or been taught or even suggested that one government, solely because of the domicile within its borders of one of the parties to a marriage, had authority, without the actual or constructive presence of the other, to exert its authority by a dissolution of the marriage tie, which exertion of power it would be the duty of other States to respect as to those subject to their jurisdiction.

II. It is urged that the suit for divorce was a proceeding *in rem*, and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the *res*, entitled to be enforced in the State of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicile of the person there suing and yet attributes to the decree resting upon the domicile of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject matter of the controversy. But putting this contradiction aside, what, may we ask, was the *res* in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory then upon which the proposition proceeds must be that the *res* in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that State, it must be admitted, under the hypothesis stated, that before the husband deserted the wife in New York, the *res* was in New York and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicile in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the *res*, it follows that it was divisible, and therefore there was a *res* in the State of New York and one in the State of Connecticut. Thus considered, it is clear that the power of one State did not extend to affecting the thing situated in another State. As illustrating this conception, we notice the case of *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 485. The facts in that case were these: A bill was filed in a District Court of the United States for the District of Iowa to abate a nuisance alleged to have been occasioned by a bridge across the Mississippi River dividing the States of Illinois and Iowa. Under the assumption that the nuisance was occasioned by the operation of the bridge on the Illinois side, the court, after pointing out that the United States Circuit Court for the District of Iowa exercised the same jurisdiction that a State court of Iowa could exercise and no more, said (p. 494):

“The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court’s jurisdiction and powers of inquiry, and outside of the case.”

Nor has the conclusive force of the view which we have stated been met by the suggestion that the *res* was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in differ-

ent places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that State had the power to determine the status of the non-resident wife by a decree which had obligatory force outside of the State of Connecticut. Here, again, the argument comes to this, that, because the State of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that State also had the authority to oust the State of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that State.

III. It is urged that whilst marriage is in one aspect a contract, it is nevertheless a contract in which society is deeply interested, and, therefore, government must have the power to determine whether a marriage exists or to dissolve it, and hence the Connecticut court had jurisdiction of the relation and the right to dissolve it, not only as to its own citizen but as to a citizen of New York who was not subject to the jurisdiction of the State of Connecticut. The proposition involves in another form of statement the *non sequitur* which we have previously pointed out; that is, that, because government possesses power over marriage, therefore the existence of that power must be rendered unavailing.

Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without at the same time saying that the marriage is dissolved as to both in every other jurisdiction, therefore the Connecticut decree should have obligatory effect in New York as to the citizen of that State. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated. Besides, the proposition presupposes that, because in the exercise of its power over its own citizens, a State may determine to dissolve the marriage tie by a decree which is efficacious within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a State may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another State. The distinction was clearly pointed out in *Blackinton v. Blackinton*, 141 Mass. 432. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicile in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing fully that under the circumstances disclosed the domicile of the husband was not the domicile of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extraterritorial force. But

this circumstance was held not to be controlling and the decree was awarded. The same doctrine was clearly expounded by the Privy Council, in an opinion delivered by Lord Watson, in the divorce case of *Le Mesurier v. Le Mesurier* (1895), A. C. 517, where it was said (p. 527):

“When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. . . . On the other hand, a decree of divorce *a vinculo*, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority.”

IV. The contention that if the power of one State to decree a dissolution of a marriage which would be compulsory upon the other States be limited to cases where both parties are subject to the jurisdiction, the right to obtain a divorce could be so hampered and restricted as to be in effect impossible of exercise, is but to insist that in order to favor the dissolution of marriage and to cause its permanency to depend upon the mere caprice or wrong of the parties, there should not be applied to the right to obtain a divorce those fundamental principles which safeguard the exercise of the simplest rights. In other words, the argument but reproduces the fallacy already exposed, which is, that one State must be endowed with the attribute of destroying the authority of all the others concerning the dissolution of marriage in order to render such dissolution easy of procurement. But even if the true and controlling principles be for a moment put aside and mere considerations of inconvenience be looked at, it would follow that the preponderance of inconvenience would be against the contention that a State should have the power to exert its authority concerning the dissolution of marriage as to those not amenable to its jurisdiction. By the application of that rule each State is given the power of overshadowing the authority of all the other States, thus causing the marriage tie to be less protected than any other civil obligation, and this to be accomplished by destroying individual rights without a hearing and by tribunals having no jurisdiction. Further, the admission that jurisdiction in the courts of one State over one party alone was the test of the right to dissolve the marriage tie as to the other party although domiciled in another State, would at once render such test impossible of general application. In other words, the test, if admitted, would destroy itself. This follows, since if that test were the rule, each party to the marriage in one State would have a right to acquire a domicile in a different State and there institute proceedings for divorce. It would hence necessarily arise that domicile would be no longer the determinative criterion, but the mere race of diligence between the parties in seeking different forums in other States or the celerity by which in such States judgments of divorce might be

procured would have to be considered in order to decide which forum was controlling.

On the other hand, the denial of the power to enforce in another State a decree of divorce rendered against a person who was not subject to the jurisdiction of the State in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the States over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy but also to protect the individual rights of their citizens. It does not deprive a State of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction, and does not debar other States from giving such effect to a judgment of that character as they may elect to do under mere principles of State comity. It causes the full faith and credit clause of the Constitution to operate upon decrees of divorce in the respective States just as that clause operates upon other rights, that is, it compels all the States to recognize and enforce a judgment of divorce rendered in other States where both parties were subject to the jurisdiction of the State in which the decree was rendered, and it enables the States rendering such decrees to take into view for the purpose of the exercise of their authority the existence of a matrimonial domicile from which the presence of a party not physically present within the borders of a State may be constructively found to exist.

Having thus disposed of the reasoning advanced to sustain the assertion that the courts of the State of New York were bound by the full faith and credit clause to give full effect to the Connecticut decree, we are brought to consider the authorities relied upon to support that proposition.

Whilst the continental and English authorities are not alluded to in the argument, it may be well, in the most summary way, to refer to them as a means of illustrating the question for consideration. The extent of the power which independent sovereignties exercised over the dissolution of the marriage tie, as to their own citizens, gave rise, in the nature of things, to controversies concerning the extraterritorial effect to be given to a dissolution of such tie when made between citizens of one country by judicial tribunals of another country in which such citizens had become domiciled. We do not deem it essential, however, to consider the conflicting theories and divergent rules of public policy which were thus engendered. We are relieved of the necessity of entering upon such an inquiry, since it cannot be doubted that neither the practice nor the theories controlling in the countries on the continent lend the slightest sanction to the contention that a government, simply because one of the parties to a marriage was domiciled within its borders, where no matrimonial domicile ever existed, had power to render a decree dissolving a marriage which on principles of international law was entitled to obligatory extraterritorial effect as to the other party to the marriage, a citizen of another country. Wharton *Conf. Laws*, 3d ed., v. 1, p. 441, § 209 and notes

It cannot be doubted, also, that the courts of England decline to treat a foreign decree of divorce as having obligatory extraterritorial force when both parties to the marriage were not subject to the jurisdiction of the court which rendered the decree. *Shaw v. Gould*, L. R. 3 H. L. 55; *Harvey v. Farnie*, 8 App. Cas. 43. And, although it has been suggested in opinions of English judges treating of divorce questions that exceptional occasions might arise which perhaps would justify a relaxation of the rigor of the presumption that the domicile of the husband was the domicile of the wife, per Lords Eldon and Redesdale, in *Tovey v. Lindsay*, 1 Dow. 133, 140; per Lord Westbury, in *Pitt v. Pitt*, 4 Macq. 627, 640; per Brett, L. J., in *Niboyet v. Niboyet*, 4 P. D. 1, 14; *Briggs v. Briggs*, 5 P. D. 163, 165; and per James and Cotton, L. JJ., in *Harvey v. Farnie*, 6 P. D. 47, 49, the courts of England, in cases where the jurisdiction was dependent upon domicile, have enforced the presumption and treated the wife as being within the jurisdiction where the husband was legally domiciled. But this conception was not a departure from the principle uniformly maintained, that, internationally considered, jurisdiction over both parties to a marriage was essential to the exercise of power to decree a divorce, but was simply a means of determining by a legal presumption whether both parties were within the jurisdiction. Of course the rigor of the English rule as to the domicile of the husband being the domicile of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicile. *Barber v. Barber*, 21 How. 582; *Cheever v. Wilson*, 9 Wall. 108; *Atherton v. Atherton*, 181 U. S. 155.

And even in Scotland, where residence, as distinguished from domicile, was deemed to authorize the exercise of jurisdiction to grant divorces, it was invariably recognized that the presence within the jurisdiction of both parties to the marriage was essential to authorize a decree in favor of the complainant. Wharton, Conf. Laws, § 215, v. 1, p. 447; per Lord Westbury, in *Shaw v. Gould*, L. R. 3 H. L. 88.

As respects the decisions of this court. We at once treat as inapposite, and therefore unnecessary to be here specially reviewed, those holding, *a*, that where the domicile of a plaintiff in a divorce cause is in the State where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other States to recognition under the full faith and credit clause (*Cheever v. Wilson*, *supra*); *b*, that, as distinguished from legal domicile, mere residence within a particular State of the plaintiff in a divorce cause brought in a court of such State is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant. *Andrews v. Andrews*, 188 U. S. 14; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Bell v. Bell*, 181 U. S. 175. This brings us to again consider a case heretofore referred to, principally relied upon as sustaining the contention that the domicile of one party alone is sufficient



to confer jurisdiction upon a judicial tribunal to render a decree of divorce having extraterritorial effect, viz., *Atherton v. Atherton*, 181 U. S. 155. The decision in that case, however, as we have previously said, was expressly placed upon the ground of matrimonial domicile. This is apparent from the following passage, which we excerpt from the opinion, at page 171 :

“This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicile; nor the question to what extent the good faith of the domicile may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the State which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.”

The contention, therefore, that the reasoning of the opinion demonstrates that the domicile of one of the parties alone was contemplated as being sufficient to found jurisdiction, but insists that the case decided a proposition which was excluded in unmistakable language. But, moreover, it is clear, when the facts which were involved in the *Atherton* case are taken into view, that the case could not have been decided merely upon the ground of the domicile of one of the parties, because that consideration alone would have afforded no solution of the problem which the case presented. The salient facts were these: The husband lived in Kentucky, married a citizen of New York, and the married couple took up their domicile at the home of the husband in Kentucky, where they continued to reside and where children were born to them. The wife left the matrimonial domicile and went to New York. The husband sued her in Kentucky for a divorce. Before the Kentucky suit merged into a decree the wife, having a residence in New York sufficient, under ordinary circumstances, to constitute a domicile in that State, sued the husband in the courts of New York for a limited divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband, were pending in the respective States at the same time. The husband obtained a decree in the Kentucky suit before the suit of the wife had been determined, and pleaded such decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree and the case came here, and this court decided that the courts of New York were bound to give effect to the Kentucky decree by virtue of the full faith and credit clause. Under these conditions it is clear that the case could not have been disposed of on the mere ground of the individual domicile of the parties, since upon that hypothesis, even if the efficacy of the individual domicile had been admitted, no solution would have been thereby afforded of the problem which would have arisen for decision, that problem being which of the two courts wherein the conflicting proceedings were pending had had the paramount right to enter a binding decree. Having disposed

of the case upon the principle of matrimonial domicile, it cannot in reason be conceived that the court intended to express an opinion upon the soundness of the theory of individual and separate domicile which, isolatedly considered, was inadequate to dispose of, and was, therefore, irrelevant to, the question for decision. . . .<sup>1</sup>

Without questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the State of New York to give to a decree of that character rendered in Connecticut, within the borders of the State of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that State, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore,

*Affirmed.*

HOLMES, J., with whom concurred HARLAN, BREWER, and BROWN, JJ., dissenting.<sup>2</sup>

I do not suppose that civilization will come to an end whichever way this case is decided. But as the reasoning which prevails in the mind of the majority does not convince me, and as I think that the decision not only reverses a previous well-considered decision of this court but is likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage, I think it proper to express my views. Generally stated, the issue is whether, when a husband sues in the court of his domicile for divorce from an absent wife on the ground of her desertion, the jurisdiction of the court, if there is no personal service, depends upon the merits of the case. If the wife did desert her husband in fact, or if she was served with process, I understand it not to be disputed that a decree of divorce in the case supposed would be conclusive, and so I understand it to be admitted that if the court of another State on a retrial of the merits finds them to have been decided rightly its duty will be to declare the decree a bar to its inquiry. The first form of the question is whether it has a right to inquire into the merits at all. But I think that it will appear directly that the issue is narrower even than that.

In *Atherton v. Atherton*, 181 U. S. 155, a divorce was granted on the ground of desertion, to a husband in Kentucky against a wife who had established herself in New York. She did not appear in the suit and the only notice to her was by mail. Before the decree was made

<sup>1</sup> The learned judge here examined numerous decisions of State courts, and concluded that they did not establish the proposition that such a decree as the one here examined was entitled to full faith and credit. — Ed.

<sup>2</sup> Another dissenting opinion of BROWN, J., is omitted — Ed.

she sued in New York for a divorce from bed and board, but pending the latter proceedings the Kentucky suit was brought to its end. The husband appeared in New York and set up the Kentucky decree. The New York court found that the wife left her husband because of his cruel and abusive treatment, without fault on her part, held that the Kentucky decree was no bar, and granted the wife her divorce from bed and board. The New York decree, after being affirmed by the Court of Appeals, was reversed by this court on the ground that it did not give to the Kentucky decree the faith and credit which it had by law in Kentucky. Of course, if the wife left her husband because of his cruelty and without fault on her part, as found by the New York court, she was not guilty of desertion. Yet this court held that the question of her desertion was not open but was conclusively settled by the Kentucky decree.

There is no difference, so far as I can see, between *Atherton v. Atherton* and the present case, except that in *Atherton v. Atherton* the forum of the first decree was that of the matrimonial domicile, whereas in this the court was that of a domicile afterwards acquired. After that decision any general objection to the effect of the Connecticut decree on the ground of the wife's absence from the State comes too late. So does any general objection on the ground that to give it effect invites a race of diligence. I therefore pass such arguments without discussion, although they seem to me easy to answer. Moreover, *Atherton v. Atherton* decides that the jurisdiction of the matrimonial domicile, at least, to grant a divorce for the wife's desertion without personal service, does not depend upon the fact of her desertion, but continues even if her husband's cruelty has driven her out of the State and she has acquired a separate domicile elsewhere upon the principles which we all agree are recognized by this court.

I can see no ground for giving a less effect to the decree when the husband changes his domicile after the separation has taken place. The question whether such a decree should have a less effect is the only question open, and the issue is narrowed to that. No one denies that the husband may sue for divorce in his new domicile, or, as I have said, that if he gets a decree when he really has been deserted, it will be binding everywhere. *Hawkins v. Ragsdale*, 86 Ky. 353, cited 181 U. S. 162; *Cheely v. Clayton*, 110 U. S. 701, 705. It is unnecessary to add more cases. The only reason which I have heard suggested for holding the decree not binding as to the fact that he was deserted, is that if he is deserted his power over the matrimonial domicile remains so that the domicile of the wife accompanies him wherever he goes, whereas if he is the deserter he has no such power. Of course this is a pure fiction, and fiction always is a poor ground for changing substantial rights. It seems to me also an inadequate fiction, since by the same principle, if he deserts her in the matrimonial domicile, he is equally powerless to keep her domicile there, if she moves into another State. The truth is that jurisdiction no more depends upon both parties having their domicile

within the State, than it does upon the presence of the defendant there, as is shown not only by *Atherton v. Atherton*, but by the rights of the wife in the matrimonial domicile when the husband deserts.

There is no question that a husband may establish a new domicile for himself, even if he has deserted his wife. Yet in these days of equality I do not suppose that it would be doubted that the jurisdiction of the court of the matrimonial domicile to grant a divorce for the desertion remained for her, as it would for him in the converse case. See *Cheever v. Wilson*, 9 Wall. 108. Indeed, in *Ditson v. Ditson*, 4 R. I. 87, which, after a quotation of Judge Cooley's praise of it, is stated and relied upon as one of the pillars for the decision of *Atherton v. Atherton*, a wife was granted a divorce, without personal service, in the State of a domicile acquired by her after separation, on the sole ground that in the opinion of the court its decree would be binding everywhere. If that is the law it disposes of the case of a husband under similar circumstances, that is to say of the present case, *a fortiori*; for I suppose that the notion that a wife can have a separate domicile from her husband is a modern idea. At least *Ditson v. Ditson* confirms the assumption that jurisdiction is not dependent on the wife's actually residing in the same State as her husband, which has been established by this court. *Atherton v. Atherton*, 181 U. S. 155; *Maynard v. Hill*, 125 U. S. 190; *Cheever v. Wilson*, 9 Wall. 108. When that assumption is out of the way, I repeat that I cannot see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicile and that, admitted to exist to some extent, in a domicile later acquired. I also repeat and emphasize that if the finding of a second court, contrary to the decree, that the husband was the deserter, destroys the jurisdiction in the later acquired domicile because the domicile of the wife does not follow his, the same fact ought to destroy the jurisdiction in the matrimonial domicile if in consequence of the husband's conduct the wife has left the State. But *Atherton v. Atherton* decides that it does not.

It is important to bear in mind that the present decision purports to respect and not to overrule *Atherton v. Atherton*. For that reason, among others, I spend no time in justifying that case. And yet it appears to me that the whole argument which prevails with the majority of the court is simply an argument that *Atherton v. Atherton* is wrong. I have tried in vain to discover anything tending to show a distinction between that case and this. It is true that in *Atherton v. Atherton*, Mr. Justice Gray confined the decision to the case before the court. Evidently, I should say, from internal evidence, in deference to scruples which he did not share. But a court by announcing that its decision is confined to the facts before it does not decide in advance that logic will not drive it further when new facts arise. New facts have arisen. I state what logic seems to me to require if that case is to stand, and I think it reasonable to ask for an articulate indication of how it is to be distinguished.

I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it.

is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis. When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts (R. L. c. 219, § 10), the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference. But I can find no basis for giving a greater jurisdiction to the courts of the husband's domicile when the married pair happen to have resided there for a month, even if with intent to make it a permanent abode, than if they had not lived there at all.

I may add, as a consideration distinct from those which I have urged, that I am unable to reconcile with the requirements of the Constitution, Art. 4, § 1, the notion of a judgment being valid and binding in the State where it is rendered, and yet depending for recognition to the same extent in other States of the Union upon the comity of those States. No doubt some color for such a notion may be found in State decisions. State courts do not always have the Constitution of the United States vividly present to their minds. I am responsible for language treating what seems to me the fallacy as open, in *Blackinton v. Blackinton*, 141 Mass. 432, 436. But there is no exception in the words of the Constitution. "If the judgment is conclusive in the State where it was pronounced it is equally conclusive everywhere." *Christinas v. Russell*, 5 Wall. 290, 302; *Marshall, C. J.*, in *Hampton v. McConnel*, 3 Wheat. 234; *Mills v. Duryee*, 7 Cranch, 481, 485; *Story, Const.* § 1313. See also *Hancock National Bank v. Farnum*, 176 U. S. 640, 644, 645. I find no qualification of the rule in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265. That merely decided, with regard to a case not within the words of the Constitution, that a State judgment could not be sued upon when the facts which it established were not a cause of action outside the State. It did not decide or even remotely suggest that the judgment would not be conclusive as to the facts if in any way those facts came in question. It is decided as well as admitted that a decree like that rendered in Connecticut in favor of a deserting husband is binding in the State where it is rendered. *Maynard v. Hill*, 125 U. S. 190. I think it enough to read that case in order to be convinced that at that time the court had no thought of the divorcee being confined in its effects to the Territory where it was granted, and enough to read *Ather-ton v. Atherton* to see that its whole drift and tendency now are reversed and its necessary consequences denied.

## WEATHERLEY v. WEATHERLEY.

HIGH COURT OF THE TRANSVAAL PROVINCE. 1879.

[Reported *Transv. Prov. Rep.* 66.]

THIS was an action for divorce *a vinculo matrimonii*, brought by the husband, Colonel Weatherley, on the ground of his wife's adultery, alleged to have been committed in Pretoria with one Gunn.<sup>1</sup>

KOTZÉ, J. The parties were married in England in January, 1857, the plaintiff being at that time a lieutenant in a cavalry regiment. After the marriage, Colonel Weatherley and his wife proceeded to India. They subsequently returned to England, and left again in 1875 for South Africa, arriving in the Transvaal in January, 1876. Their domicile of origin is English, but the adultery, if any, was committed within this territory. During the hearing of the case, owing to the facts disclosed in evidence, I directed counsel, after the evidence had been taken, to argue the legal question whether or not the court had jurisdiction to entertain this suit for divorce, supposing the parties not to have acquired a new civil domicile of choice in this country.

It was accordingly maintained, on behalf of the plaintiff, that there ought to have been a dilatory plea, or exception, to the jurisdiction of the court filed by the defendant, and that this not having been done, the court cannot, according to the Roman Dutch law which prevails in this country, of its own mere motion, raise the question of jurisdiction. Two authorities were cited in behalf of this position, viz., Merula, *Man van Proced.* (civ. pract.), lib. iv., tit. 40, ch. 1, n. 1, and Van der Linden, p. 414 (Henry's translation). But on examination it will be found that these writers, especially Merula, merely lay down that if the defendant wishes to take objection to the jurisdiction of the court, he must do so by way of preliminary exception before he pleads over, otherwise he submits himself to the jurisdiction of the court; and not that, if he neglects to file a declinatory exception, the court is bound to hear the case. A similar rule is known to the English common law, by which a dilatory plea, *e.g.*, to the jurisdiction, was not available after a plea in bar. So, it was further argued, on the authority of Van Leeuwen (*Rom. Dutch Law*, lib. v., chap. 8, § 4), that, by not having pleaded to the jurisdiction, the defendant must be taken to have tacitly consented that the court should have jurisdiction, and the court was consequently precluded from raising the point at the trial. Here, then, the question at once arises, whether the mere consent of parties can give the court jurisdiction? The passage in Van Leeuwen must be taken to refer to matters of a purely private and doubtful nature only; and it is not now necessary to inquire how far, in matters of this kind, the doctrine "that consent of parties gives jurisdiction (*prorogatio*)," propounded by the Roman jurists, when treating of the provisions of

<sup>1</sup> The statement of facts and arguments of counsel are omitted. — ED.

the *Lex Julia Judiciorum*, and followed by the commentators of a later date, has effect at the present day. Van der Linden, in his supplement to *Voet (ad Pandectas*, lib. ii., tit. 1, § 14), says: “Cum diversorum tribunalium institutio ad statum publicum pertineat; nec pactionibus privatorum hominum Juri publico derogari possit.” Now, although the law of domestic relations is treated of as a portion of the *Jus privatum*, the institution of a tribunal to decide on questions regarding status, arising out of the domestic relations, and the exercise of jurisdiction in such cases, is a matter which pertains *ad statum publicum*,—to the public welfare of the whole community (cf. Huber, *Jus Hodiernum*, iv., 14, § 29). Marriage is not a mere ordinary private contract between the parties: it is a contract creating a status, and gives rise to important consequences directly affecting society at large. It lies, indeed, at the root of civilized society. If, then, in a matter of divorce, the bare consent of the parties can be held sufficient to give jurisdiction, there is no protection, no safeguard, against the parties acting *in fraudem legis*; but this it is the policy, as well as the duty, of every court of justice to discourage and prevent. Huber, in his *Jus Hodiernum*, l. c. § 21–24, has very justly observed that such a doctrine would lead to endless confusion. I am clearly of opinion, therefore, that the mere consent of the parties in a question involving their matrimonial status, including divorce *a vinculo*, cannot give the court jurisdiction and make its decree legal, where, in the absence of such consent, the exercise of jurisdiction and the subsequent decree would be illegal. Nor is there anything to prevent the court, of its own mere motion, raising the question of jurisdiction. Were this not so, the court would be bound by the neglect or omission of the pleader who failed to file a proper declinatory exception. Moreover, it may sometimes happen, as in this very case, that, only after the evidence has been part heard, the facts disclosed suggest the question whether or not, under the circumstances, the court has jurisdiction (cf. Van Leeuwen, R. D. Law, 5, 4, § 2, n. 6).

A sentence of divorce pronounced by a competent court having jurisdiction of the subject-matter in one country, is, of course, binding on the courts of all civilized countries. But one of the most difficult and embarrassing questions of private international law is the question, when, and under what circumstances, will the tribunal of a given country, declaring a valid marriage dissolved, have jurisdiction to do so, in order to cause its judgment to be respected and recognized by the courts of every other country? It is admitted that the courts of any country where the parties have their *bona fide* civil domicile, have jurisdiction to dissolve a valid marriage contracted elsewhere. Story, Bishop, Burge, the law in Scotland, and the recent cases of *Shaw v. Gould*, L. R. 3 H. L. 83, and *Wilson v. Wilson*, L. R. 2 P. & D. 441, all agree in this.<sup>1</sup> . . .

<sup>1</sup> The learned judge, upon an examination of the facts, decided that Colonel Weatherley was domiciled in England. He then examined the law of England. — Ed.

In Scotland, however, there exists no doubt or difficulty on the subject. By the law of that country, which (as I shall show hereafter) is more analogous to the Roman Dutch Law, it has been laid down, by a uniform series of decisions, that the Scotch courts have jurisdiction, on proof of a just cause of divorce, to dissolve a marriage contracted in England, or any other foreign country, and they will sustain process of divorce to that effect, provided merely that such a domicile has been acquired in Scotland by the defendant as would be sufficient to found ordinary civil jurisdiction, viz., a simple residence of forty days (Erskine, Inst. Bk. I., tit. 2, § 20, in notis). A forty days' residence in Scotland excludes all consideration of a foreign domicile. A citation served on the defendant at his dwelling-place, after a residence of forty days, is good and legal; but if the citation be served personally on the defender, no residence of forty days is necessary. It is to be pointed out here that *domicile of jurisdiction* merely means a residence of forty days, whether *animo manendi* or not is immaterial; and the distinction between it and *civil domicile*, i.e., permanent residence, *animo manendi*, must not be lost sight of in discussing the question of jurisdiction.

The doctrine in Scotland is based on the right of the Scotch court to redress any personal wrong, including therefore the *delictum* of adultery, committed by a defendant within the territory of Scotland; whereas the English doctrine, which refuses to recognize the power of foreign tribunals to decree a dissolution of marriage between English subjects who have no civil domicile (*stricto sensu*) in the foreign country, is founded upon the principle that divorce is a question of status, and can only be decreed by the courts of the place of domicile, for no nation is bound to recognize the judgment of a foreign tribunal in dissolving a marriage subsisting between its own domiciled subjects temporarily absent abroad. By so doing, the foreign tribunal interferes with the jurisdiction *legis domesticæ*, and this no independent nation like England can be expected to tolerate.

A difference of opinion and principle on this subject leads to the most serious consequences. If I were to hold that this court has jurisdiction, and were to decree a divorce, the courts in England may ignore my decree altogether. Suppose, now, that Colonel Weatherley, and, in like manner, Mrs. Weatherley, were to enter into a second marriage, and that in each case issue is born of the second marriage, this second marriage would be valid, and the issue legitimate in the Transvaal, in Scotland, and perhaps in other countries, whereas by English law the second marriage would be invalid, the issue thereof bastard, and Colonel and Mrs. Weatherley would be guilty of bigamy, and punishable as felons. In the absence of any uniform rule, the court must lay down a principle and give a decision, and is, moreover, bound to state the reasons upon which it professes to act. When judges and lawyers of recognized eminence and reputation have, with great learning and ability, expressed different views on the subject, it behoves one, in the



language of a learned commentator, to tread both reverently and cautiously, and I therefore approach the question with some diffidence. Huber, in his *Prælectiones*, vol. ii., *de conflictu legum*, § 2, has laid it down as an axiom that all persons who are actually within the territory of a given State, whether permanently or only for a temporary purpose, are subject to its laws and the jurisdiction of its courts. No doubt a mere temporary subject, *subditus temporarius*, as Voet (*de Statutis*, n. 5) terms it, is not liable to certain portions of the laws, which are alone applicable to domiciled subjects. Thus domiciled subjects (*stricto sensu*) are liable to the discharge of public duties, the payment of taxes, and also exercise certain municipal rights and privileges from which he who is merely a temporary resident or visitor is excluded; and this, it seems to me, is the meaning of Van der Keessel, in *Thesis* 30, so much pressed upon me by counsel for the defendant. But a temporary subject is amenable to the court, not merely in the case of crime, but also for every delict or wrongful act committed by him within its jurisdiction. Bynkershoek, *de foro legatorum*, cap. 3, to which, at the conclusion of the argument, my attention was drawn, also adopts this view. He says, that a mere temporary or casual visitor to Holland does not establish a forum in that country for all purposes, *quia advena est, non subditus*; that is to say, not a domiciled subject, although he would come under the jurisdiction of the courts of Holland *delicti causa*. A temporary resident, therefore, would be liable for defamation, ordinary trespass, seduction, and the like, committed by him in the foreign territory. In these instances the court of the place where the wrong is committed has power to give redress to the injured party; why, then, should the court not have jurisdiction also to redress a matrimonial wrong, viz., adultery? Those who answer this question in the negative maintain that divorce is a matter of status, and must be referred to the *lex domicilii* of the parties. Thus, Lord Westbury, in *Shaw v. Gould* (L. R. 3 H. L. 83), observes: "Questions of personal status depend on the law of the actual domicile. It is said by a foreign jurist of authority (Rodenburg), and his works are cited with approbation by many recent writers: 'Unicum hoc ipsa rei natura ac necessitas invexit ut cum de statu et conditione hominum quæritur, solum modo judici, et quidem domicilii, universum in illa jus sit attributum.' This position, that *universum jus*, — that is, jurisdiction which is complete, and ought to be everywhere recognized, does in all matters touching the personal status or condition of persons belong to the judge of that country where the persons are domiciled, — has been generally recognized." But it may be said, in answer to this, that it has not been generally recognized that jurisdiction belongs exclusively in all matters of status to the judge of the actual domicile alone *for all purposes*. Scotch judges and lawyers have adopted a different view, and John Voet distinctly controverts the doctrine of Rodenburg. In his commentary, *ad Pandectas*, lib. 1, *de Statutis*, No. 8, after quoting the above passage from Rodenburg, he says: "Sed quæ illa fuerit rei natura quæ necessitas satis urgens nec dum licuit animadvertere."

Rodenburg argues that, in matters affecting the status of an individual, we should apply the law of one fixed place, viz., of the domicile; for it would be absurd that a person should undergo a change of status in every country he might happen to visit or pass through: *e.g.*, that a party should be *sui juris*, or a wife *in potestate*, or a prodigal, in one place, and *alieni juris*, *extra potestatem*, and *frugus* in another place. This argument is said to be founded on convenience, and the rule may now be taken to be that the personal status of a party, as defined by the law of his domicile, whether of origin or habitation, follows the person, like his shadow, everywhere (cf. Van der Keessel, Th. 42). But what is the precise extent or scope of this rule? Does it indiscriminately apply to all matters of status for all purposes? It may be sound and reasonable to lay down that a person who is a minor or prodigal by the law of his domicile should be so considered, even in a foreign country, as regards transactions entered into by him there. It may be that a married woman who is considered as a minor by the law of her domicile should be considered a minor in every other country. But then the law of the foreign country relating to minors and prodigals, where the transaction takes place and comes into question, is to be resorted to, and not the *lex domicilii* (cf. Huber, *Praelectiones*, vol. ii., *de conflictu legum*, §§ 12, 13). On the other hand, the contract of marriage, which creates the status of husband and wife, depends for its validity on the law of the place where the marriage is celebrated, which is often not the law of the domicile. Here, then, the question whether the parties to the contract of marriage are husband and wife — a question of personal status in the strictest sense of the word — is determined by the *lex loci contractus*, and not by the law of the domicile of the parties. It may very fairly be doubted whether the doctrine of Rodenburg, which professes to be founded on convenience and expediency, does not admit of a limitation. It may very fairly be doubted whether the rule can be extended so as to exclude a foreign tribunal from exercising its jurisdiction in matrimonial matters over persons who, although domiciled elsewhere, are nevertheless *bona fide* resident within the foreign country. The foreign law of England can in this case only be allowed to have effect in this territory, in so far as it does not interfere with our law and the authority of our courts, or with the rights of our citizens, with good government, and public utility. “*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur*” (Huber, *Praelectiones*, vol. ii., *de conflictu legum*, § 2). It is, moreover, the province of this court alone, and not of the foreign tribunal, to lay down what is the law applicable to the case before it, and what is most in accord with good government, justice, or public convenience in the Transvaal.<sup>1</sup> . . .

<sup>1</sup> The learned judge here cited and examined at length passages from Burge, *Foreign and Colonial Law*, vol. i., p. 689, and Bishop, *Marriage and Divorce*, vol. ii., ch. x., § 138. — Ed.

The principle that the courts of the parties' actual domicile *alone* can dissolve the marriage tie existing between them seems to me entirely inexpedient, and may lead to positive injustice. Expediency is altogether against such a rigid doctrine. Let me put a few examples. Suppose an English gentleman is appointed civil governor of a colony, say for five years, or is appointed a special commissioner to investigate certain matters in the colony. He leaves England, where he has his domicile, with his wife and family, and takes up his residence in the colony. While there, his wife commits adultery. Now the rule which the learned persons I have mentioned contend for, would effectually deprive the innocent husband of redress at the hands of the tribunal within whose territory the commission of adultery took place. Take another instance. An English engineer is employed by a company to construct a line of railway or open a mine in the Transvaal. He brings out his wife and family with him to this country, where he will probably remain for a few years. Under these circumstances the domicile is still English. The husband commits adultery and deserts his wife; is, now, this court precluded from affording protection and redress to the innocent wife because, although the adultery was committed here, her domicile is in England, she being only a temporary resident in the Transvaal? Would the refusal of the court to exercise jurisdiction not be a denial of justice to her? Is she to be compelled to seek relief in a court 6,000 or 7,000 miles away from the place where the wrong was committed and all the witnesses reside? It may often, under such circumstances, be practically impossible for her to proceed to England without pecuniary assistance from her husband, which she is not likely to obtain. Or suppose that in all these instances the wife commits adultery, is the husband to wait until his return to England before he can hope to be released from a bond uniting him to an adulteress? Pursue this matter a little further, and suppose that the governor, or the special commissioner, is ordered to another colony, or the engineer is obliged to accept a fresh engagement in some other place, what is each of them to do with his guilty wife? Must each of them wait till he returns to the country of his domicile before instituting proceedings, when probably the witnesses to testify to her adultery are all dead? The constant and increasing intercourse going on between England and her colonies, which are to a great extent, for purposes of jurisdiction, foreign countries, will suggest numerous other examples; and it seems to me that a strict adherence to the doctrine, which excludes the exercise of jurisdiction on the part of the tribunal of the place where the adultery is committed, and entirely confines it to the tribunal of the actual domicile, is productive of much delay and expense, inconvenience and injustice. I cannot help thinking that Rodenburg never intended that the rule he laid down on the ground of convenience should receive the extensive and exclusive application which some lawyers have given to it. The rule is supposed to be based on convenience, and as soon, therefore, as it ceases to be convenient by causing positive inconven-

ience, it ought no longer to apply. *Cessante ratione legis cessat lex ipsa*.<sup>1</sup> . . .

The present case comes to this: An English gentleman and his wife are temporary residents in the Transvaal. The court of this country recognizes their status of husband and wife. It will compel them to fulfil and observe towards each other all the duties to which the relation they occupy gives rise. It will recognize the authority of the father over the children of the marriage, and is bound to redress all wrongs and injuries peculiar to the marriage relation committed within the limits of the territory over which its jurisdiction extends. If the husband ill-treats his wife, refuses her support, or deserts her, she has a right to seek redress from this court, within whose jurisdiction she and her husband reside, and where the wrong is committed. This court may entertain a suit for restitution of conjugal rights at the instance of either the husband or the wife. Why may it not, then, decree a divorce *a vinculo* on the ground of adultery? Where is the law which forbids it. Where is the law which says, You shall recognize the relation of husband and wife, but shall forbear to take cognizance of and redress wrongs committed in violation of the marriage relation within your jurisdiction?<sup>2</sup> . . .

Upon the whole, then, I have come to the conclusion that this court has jurisdiction, for the following reasons, viz.: 1st. Upon the general ground that, by Roman Dutch Law, the court has power to take cognizance of any wrong or delict committed within this territory by persons having an actual *bona fide* residence here at the time, it being immaterial whether such residence amounts to a *domicilium* or not, and to apply the suitable remedy thereto. 2d. Upon the ground that sound policy, expediency, and justice demand that jurisdiction should be assumed. 3d. Upon the ground that the law of Scotland, which is most analogous to the Roman Dutch law, favors the assumption and exercise of jurisdiction under the circumstances of this case.

There are, however, certain special features in this case, connected with the question of jurisdiction, which must not be lost sight of. The petitioner and respondent have had a *bona fide* residence of three years in this country. This is, as it were, a middle case. If, on the one hand, the parties are not domiciled here, on the other hand they are not mere casual travellers,—here to-day and there to-morrow. They have not repaired to this country with the view of giving this court jurisdiction *in fraudem legis domicilii*. The adultery, if any, was committed here, and the respondent has been personally served with the summons, and has entered appearance. The adultery of the wife

<sup>1</sup> The learned judge here cited and examined a passage from Phillimore, *International Law*, vol. iv., ch. 21, § 96.—Ed.

<sup>2</sup> The learned judge here quoted from the opinions of Lord Meadowbank in *Utterton v. Tewsh, Ferguson*, 23, 57, of Lord Colonsay in *Shaw v. Gould*, L. R. 3 H. L. 95, and of the Lord Justice Clerk (Hope) in *Shields v. Shields*, 15 Sess. Cas. (N. S.) 142; and examined the case of *Newberry v. Newberry*, 1 Menz. Rep. 248 (cited).—Ed.

is recognized in all Protestant countries, including England (the *locus domicilii*), as a valid cause of dissolution *a vinculo matrimonii*. The courts in England, therefore, cannot say, if I were to grant a decree dissolving the marriage, that the dissolution is grounded on a cause of divorce which, in England, is considered *contra bonos mores*, and at variance with the policy of its marriage laws. But these circumstances are, properly speaking, rather matters for the consideration of the courts in England than for this court. So long as different countries have different laws of divorce, so long will inconvenient consequences be the result.<sup>1</sup>

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### WILHELM v. WILHELM.

COURT OF APPEAL OF PARIS. 1896.

[Reported 23 *Clunet*, 149.]

THE COURT. The appellant, a Frenchwoman by birth, married at Paris, February 13, 1875, John Henry Wilhelm, a German subject. In June, 1876, he abandoned the conjugal domicile without letting her know where he had gone, and since that time the wife has had no news of him. As a result, after several years of waiting, Mrs. Wilhelm filed a petition for divorce against her husband; but the judges below declared themselves without jurisdiction because, the parties being foreigners, the French courts could not pass on such a question. But the incompetence of French courts to entertain suits between foreigners is not absolute; it is facultative only, the judge having power, according to the circumstances, to take or to refuse to take cognizance of the affair submitted to them. A proper occasion for making use of the power thus reserved to them exists when, as in this case, the domicile of the defendant is unknown, and consequently the plaintiff, a resident of France, cannot apply to any other court.

On the merits: since the facts show that Wilhelm abandoned his wife many years ago, under conditions injurious to her, and that a divorce may be decreed against him, for these reasons the judgment appealed from is reversed, and it is adjudged that the Tribunal of the Seine was competent to pass upon the petition for divorce filed by Mrs. Wilhelm. And since the cause is ripe for judgment, judgment is given on the merits. Divorce is decreed between the Wilhelms on the wife's libel, with all the legal consequences.<sup>2</sup> . . .

<sup>1</sup> The learned judge here reviewed the evidence, and declined to grant a divorce on the ground of collusion. — Ed.

<sup>2</sup> This is now the established rule of the French courts. Cass. 18 July, 1882 (20 *Clunet*, 177); Paris, 12 Jan. 1894 (21 *Clunet*, 123); Paris, 7 Dec. 1894 (22 *Clunet*, 97); Seine, 24 May, 1897 (25 *Clunet*, 111).

The general rule that a divorce can be granted only in the country to which the parties owe allegiance prevails generally in Europe. Paris, 28 May, 1884 (11

## IN RE W'S MARRIAGE.

SUPREME COURT OF AUSTRIA. 1896.

[Reported 25 Clunet, 385.]

IN a complaint filed May 3, 1892, in the Court of First Instance of Prague, criminal session, Prince Francis-Victor B. alleged that on the 6th of October, 1878, at Nizbor, Bohemia, he had married Marie K. according to the Roman Catholic forms; and that by a decision of the County Court of Karolinenthal, on July 12, 1890, a judicial separation had been decreed between them. Madame B. had then abjured the Catholic religion and entered the Unitarian Church, and on the 28th of November, 1891, at Klausenburg, Transylvania, had contracted a second marriage with Leopold W., formerly domiciled at C., in the county of Karolinenthal. At the time of filing this complaint, Francis-Victor B. prayed the court to decide whether the marriage between himself and Marie K. should be regarded as still existing.

A criminal suit was instituted on complaint of the Imperial Proctor. It was found upon investigation that Marie B. and Leopold W. had renounced their Austrian nationality. In accordance with a decree of the Hungarian Minister of the Interior, November 9, 1891, Leopold W., adopted by Alexander S., acquired Hungarian nationality; Marie B., adopted by Joseph F., did the same by decree of the same Minister, dated October 28, 1891. According to the evidence of the priest of Klausenburg, Marie K., wife of B., inhabitant of that village, was on September 28, 1891, received into the Unitarian Church after having abjured the Roman Catholic religion. A certificate of the Burgomaster of Klausenburg, November 28, 1891, proved that Leopold W. was a citizen of Klausenburg. The Superior Ecclesiastical Court of Klausenburg, November 27, 1891, affirmed the judgment of the Inferior Ecclesiastical Court of November 19, 1891, which had pronounced a divorce

Clunet, 623); Seine, 10 May, 1897 (25 Clunet, 115); Athens, 1897 (25 Clunet, 962); Milan, 15 Feb. 1876 (3 Clunet, 220); Sweden, 14 Aug. 1893 (21 Clunet, 602; but see Sweden, 28 Feb. 1894, 22 Clunet, 191).

In some of these states a divorce will be granted to a domiciled foreigner if he proves that full recognition will be given to the divorce in the country to which he owes allegiance. Antwerp, 16 March, 1895 (23 Clunet, 655); Geneva, 26 Nov. 1893 (26 Clunet, 876); Trib. Fed. Switz. 1898 (26 Clunet, 191); Genoa, 7 June, 1894 (25 Clunet, 412); Monaco, 17 May, 1895 (23 Clunet, 913).

In other states of Europe the domicile of the parties, or of the defendant, is enough to give jurisdiction for divorce. German Empire, 19 June, 1883 (11 Clunet, 307); Luxembourg, 5 Jan. 1887 (14 Clunet, 674); Netherlands, 28 May, 1897 (26 Clunet, 869). In Austria the state of domicile has jurisdiction if the parties both consent. Supreme Court, 7 March, 1883 (15 Clunet, 128); 4 Feb. 1891 (18 Clunet, 999).

In France and Switzerland incompetence to pronounce a divorce between foreigners is due solely to defect of personal jurisdiction; objection must be set up by the defendant *in limine*, or he cannot object. Seine, 5 June, 1891 (19 Clunet, 194); Besançon, 18 Dec. 1896 (25 Clunet, 355); Algiers, 1 Feb. 1897 (25 Clunet, 352); Geneva, 6 May, 1876 (3 Clunet, 227). — ED.

between Marie K. and her husband Francis-Victor B., and had authorized the former to marry again.

According to a certificate of the Evangelical minister of Klausenburg, Leopold W., a member of the Evangelical Church, domiciled at Klausenburg, and Marie K., a member of the Unitarian Church, divorced from her former husband, were married November 29, 1891; the certificate added that the marriage took place in the Evangelical Church, and not according to usage, in the Unitarian Church, because the priest of the latter church was ignorant of German; and also because Marie K. had left the Unitarian Church to embrace the Evangelical religion. The administrator of the Circle of Klausenburg attested, by certificate dated November 13, 1893, that Leopold W. is a citizen of Klausenburg and has lived there for two years. The Administrator of the District of Kutenberg attested, by certificate of April 10, 1894, that Francis-Victor B. has given up his Austrian nationality and is traveling in Hungary. By decree of the Hungarian Minister of the Interior, dated July 28, 1894, Francis-Victor B. was naturalized in Hungary; according to a certificate of the Unitarian Ecclesiastical Court of Budapest he left the Roman Catholic Church, April 9, 1894, and embraced the Unitarian faith. In accordance with a judgment of the Inferior Unitarian Court, affirmed on appeal, a divorce was pronounced between Francis-Victor B. and his wife, and the former was allowed to marry again. He declared that he had no legal cause of complaint against Marie K., and recognized the validity of her second marriage.

By a decision of January 24, 1893, the Court of First Instance of Prague decided that it had jurisdiction to pass on the validity of the marriage between Marie B. and Leopold W.; and by judgment of December 26, 1895, it declared the marriage null.<sup>1</sup> . . . By a judgment of April 8, 1896, the Court of Appeal of Prague affirmed the decision. . . . Upon a writ of error the Supreme Court, on October 20, 1896, rendered the following decision.

THE COURT. The judges of the lower courts have rightly declared null, in the countries governed by the Civil Code of June 1, 1811, Marie K.'s second marriage. It is wrong to object that the Austrian courts cannot pass upon this question, because Leopold W. and Marie K. are foreigners and do not belong to the Catholic Church, since they had abjured their Austrian nationality and their Catholic religion before their marriage, and the marriage was contracted abroad. The question is really not whether this marriage was contracted according to the regular forms required by the Hungarian law, but simply what effects this marriage can produce in countries governed by the Austrian Civil Code, especially as regards family rights and the rights of succession. For the following reasons the opinion of the Court of Appeal is quite correct.

1. Francis B. and Marie K. were married, at a time when both were of Austrian nationality and belonged to the Roman Catholic religion, in the church of Nizbor, according to the Roman Catholic forms.

<sup>1</sup> The opinions of the lower courts are omitted. — ED.

2. The marriage has not up to this time been dissolved according to the rules laid down in the Civil Code ; the spouses have simply obtained a judicial separation, pronounced July 12, 1890, by the County Court of Karolinenthal.

3. A short time after this separation, Marie K., having abjured the Austrian nationality and the Catholic religion to embrace the Hungarian nationality and the Unitarian religion, contracted a new marriage with Leopold W. at the Evangelical Church in Klausenburg.

4. Finally, Francis B. and Leopold W. both own landed estates at K., district of Karolinenthal, as to which they are subject to the jurisdiction and the provisions of the Austrian law.

It is doubtless averred that the ecclesiastical courts of Klausenburg had declared the marriage between Francis B. and Marie K. dissolved, and have authorized the latter to marry again. But, for one thing, these decisions affect Marie K. alone ; for another, at the time of their marriage Francis-Victor B. and Marie K. belonged to the Catholic religion, and by the terms of § 111 of the Civil Code a marriage of that kind cannot be dissolved. This section is the more applicable to this case because at the time the judgments were given, Francis B. still belonged to the Austrian nationality, and as a result the Austrian courts alone could take jurisdiction of a suit for the dissolution of his marriage. Later, it is true, in 1894 or 1895, Francis-Victor B. himself abjured his Austrian nationality to become an Hungarian, and then abjured the Roman Catholic religion to embrace the Unitarian ; that he obtained a judgment of the ecclesiastical court dissolving his marriage with Marie K. and authorizing him to marry again ; and finally that he declared that he considered his wife's second marriage valid. But all these things are insufficient to justify the abandonment of the official inquiry set on foot by the Austrian decree, still in force, of August 23, 1819. For, 1, the laws of marriage have their foundation in public policy. 2. The marriage contracted October 30, 1878, according to the Catholic form, in the church of Nizbor, between Francis-Victor B. and Marie K., ought, in Austria, to be considered in full force. 3. The question of the validity of this marriage should be dealt with solely according to Austrian law ; and the decisions rendered in this case by the ecclesiastical courts are foreign judgments without force here. 4. Since no Austrian court has declared the marriage between Francis-Victor B. and Marie K. at an end, it continues in existence. 5. The judicial separation between them, pronounced July 12, 1890, by the County Court of Karolinenthal, is not transformed into a divorce by the mere fact that the spouses have abjured the Catholic religion and entered the Protestant church. 6. According to Austrian law, especially § 93 of the Civil Code, spouses, even upon agreement between them, are not permitted to dissolve their marriage by their own will. 7. The consequences and legal effects of the foreign marriage between Leopold W. and Marie K. ought, as between the latter and her first husband, to be determined according to the situation as it was at



the moment of the second marriage. 8. At that time, Francis-Victor B. was still an Austrian citizen; furthermore, he, as well as Leopold W., possessed landed estates in Austria; both had their domicile there. The competence of the court of Prague is the clearer, because Francis-Victor B., in the petition addressed to the Court of First Instance of Prague, praying for an inquiry, described himself as belonging to the Catholic religion, and as an Austrian citizen domiciled within the district of the court. Marriage, as the foundation of the family, should be the union of one man with one wife. This principle is recognized by the Austrian Civil Code, for § 62 provides that "a man can at one time have but one wife, and a woman but one husband; and any person who, having been once married, desires to contract a new marriage should establish the dissolution of the marriage." And again § 111 provides: "Marriage legally contracted between Catholics cannot be dissolved save by the death of one party, and is therefore indissoluble, even if but one of the parties belongs, at the time of the marriage, to the Catholic Church." The last provision is to be applied, according to a ministerial circular of July 14, 1854 (Bulletin of Laws, no. 193), even in a case where after the marriage the spouses, or one of them, are converted to the Protestant religion. The statutory provisions have not been modified by the laws of May 25, 1868 (Bulletin of Laws, no. 47), and of April 9, 1870 (Bulletin of Laws, no. 51).

It follows from these facts that at the time of Marie K.'s second marriage the dissolution of her first marriage had not taken place in Austria; her second marriage was therefore null, according to the terms of §§ 62 and 111 of the Civil Code, in all countries governed by the Austrian Civil Code.<sup>1</sup>

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### TIRVEILLOT v. TIRVEILLOT.

CIVIL TRIBUNAL OF THE SEINE. 1898.

[Reported 25 *Clunet*, 927.]

THE COURT. Mme. Tirveillot has filed against her husband a petition for judicial separation, and to protect her eventual rights, pending the litigation, she has attached certain property; Tirveillot moves to dissolve the attachments. These questions are connected, and should be considered together.

As to the judicial separation, Tirveillot pleads to the jurisdiction of

<sup>1</sup> *Acc.* Austria Supr. Ct. 9 Dec. 1885 (13 *Clunet*, 471); Paris, 14 March, 1889 (16 *Clunet*, 463).

Where one spouse is naturalized, the other retaining his or her former allegiance, French jurisprudence is uncertain whether the former may obtain a valid divorce in the state of his new allegiance. That he may, see Tunis, 21 March, 1892 (19 *Clunet*, 933); Algiers, 13 Dec. 1897 (25 *Clunet*, 723). That he may not, see Nice, 9 Dec. 1896 (24 *Clunet*, 333). — Ed.

the court on the ground that he became before his marriage a naturalized American citizen, and by the marriage conferred his own nationality on his wife; and the American courts thus have jurisdiction of the present question. Tirveillot proved that several years ago he left France to make his home in America, without the intention of returning; and on his application he was by the competent authority naturalized as an American citizen; this was known to Mme. Tirveillot when she married the defendant, January 21, 1876, at the New York City Hall, according to the American forms. She herself was so sure of her husband's foreign nationality, and therefore of hers, that she set up a plea to the jurisdiction when the defendant's father, in 1878, filed against her in this court a petition for nullity of the marriage. . . . It is certain that for more than twenty years, with the exception of several journeys to Europe made necessary by family affairs, Tirveillot has always lived in the United States of America, where he had his principal dwelling; since his naturalization he has never had a real domicile in France; he shows that it is possible for the petitioner to bring her suit in an American court; indeed, he has himself instituted a suit for divorce before the Marton County Court in the United States.

As to alimony: laws of the police and of safety bind all who live in the country. Although declaring itself without jurisdiction to pronounce a judicial separation, this court may take provisionally all necessary measures for the safety of the wife and the preservation of her property. We may allow alimony sufficient for her immediate needs and for the expenses she will immediately incur as a result of being required to bring her suit before a competent court.

As to expenses of litigation: the prayer for an allowance of litigation expenses is closely bound up with the principal suit; it belongs to the court which has jurisdiction of the substantial suit to determine this request.

As to the dissolution of attachment: since Mme. Tirveillot has made a regular attachment *pendente lite* by authority of court, and it falls within the class of cases where the court may authorize provisory measures, the attachment should be maintained.

For these reasons, the suits are joined, and disposed of in this single judgment: the court declares itself without jurisdiction to pass on Mme. Tirveillot's petition for judicial separation: and as to the provisory measures, orders Tirveillot to pay his wife alimony at the rate of three hundred francs a month, in advance; maintains the attachment; and declares itself incompetent to allow the petitioner the expenses of litigation. Orders Mme. Tirveillot to pay the costs of the petition for judicial separation, and Tirveillot to pay those of the application to dissolve the attachment.

## PART II.

### REMEDIES.

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## CHAPTER IV.

### RIGHT OF ACTION.

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#### RAFAEL v. VERELST.

COMMON PLEAS. 1776.

[*Reported 2 William Blackstone, 1055.*]

THIS case was tried before Lord Chief Justice DE GREY, by a special jury in London, at the sittings in Michaelmas Term, when they found a special verdict to the following effect: That the plaintiff was an Armenian merchant and a native of Ispahan — had for some years resided in Bengal; but in March, 1768, and before, had been resident at Fyzabad, the capital of the province of Owd, in the dominions of the Nabob Sujah al Dowlah, and part of the empire of Indostan, for the purpose of trading there, both on his own account, and as agent to some English merchants. That the defendant was President of Bengal under the East India Company, and that a battalion of the company's troops, being 600 men and upwards, were stationed at Fyzabad under the command of Captain Harper; and another brigade, commanded by Sir Robert Barker, was stationed at Illahabad, the then residence of the Mogul Shah Allum. That the battalion at Fyzabad were in the pay of the East India Company, and had been stationed there in 1766, at the request of the Nabob, from whom they received additional pay. That in March, 1768, the plaintiff was seized and imprisoned at Fyzabad (by order of the Nabob) by some soldiers of Captain Harper's battalion, and conveyed to Muxadabad, the capital of Bengal, and there detained for two months, till August, 1768. And that the said arrest and imprisonment were by the means and procurement of the defendant. That the Nabob was constitutionally independent of the East India Company, but in ordering the said arrest and imprisonment was under the awe and influence of the defendant, and acted contrary to his own inclination, being fearful of offending him. That the civil government of Bengal is carried on in the name of the Nabob of Bengal, but the real and effective powers thereof are in the East India Company, and

also the revenues, paying a stipend to the said Nabob of Bengal, and other officers, for the support of their rank and dignity. That the imprisonment in the province of Bengal was by the procurement of the defendant, and was a continuation of that made in the province of Owd. And if, upon the whole, the defendant is guilty of the whole trespass, they assess £4000 damages: if only of that in Bengal, then only £3000; if only of that in Owd, £1000; and conclude to the judgment of the court.<sup>1</sup>

DE GREY, C. J. In the present case there are some things found by the special verdict, which have not, nor cannot, be insisted on as material in excuse of the defendant. As, 1. That the plaintiff is an alien; for this is no objection in personal actions; 1 Atk. 51. 2. That the defendant was president or governor of Bengal; he not having justified specially under that authority. 3. The place where the imprisonment happened; viz. the dominions of a foreign prince. Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and *sequuntur forum rei*. And though in all declarations of trespass, it is laid "*contra pacem Regis*," yet that is only matter of form, and not traversable. But the great doubt is, whether, when an injurious act is committed by color of juridical authority, or by the order of an absolute prince, such act can be a trespass there, where it is done, — or here, where it is not done. I shall say nothing as to the nature of the Nabob's government, or to the position, that the commands of absolute princes do of course legalize their acts. But I consider the Nabob as not being the actor in this case; but the act to be done, in point of law, by those who procured or commanded it; and in them it may doubtless be a trespass. Sujah Dowla was a mere instrument. He acted not from any motives of his own, but gave way through awe and fear. If, in the doing of an act, there be several intervening agents, and one happens not to be amenable, will it be said that all the rest are excused? Suppose it the very act of the Nabob, who lends himself to the defendant's will, and undergoes a voluntary servitude to his pleasure, — the accidental circumstances of such a man shall not exempt the rest, who concur in the act. It is laid down in Foster, 125, that procuring a felony to be committed makes an accessory to the felony; and I take it to be a settled rule, that whatever makes an accessory in felony will make a principal in trespass. Since, therefore, the jury have found the procurement of the defendant, it follows that he is liable as a principal, for this trespass.

GOULD, J., of the same opinion, and cited the Earl of Salop's case, 9 Rep. 42.

BLACKSTONE, J., of the same opinion. The finding of this verdict has removed all former doubts. It not only finds the imprisonment to have been committed by the means and procurement, but by the com-

<sup>1</sup> Arguments of counsel are omitted.—ED.

mand, nay, even the compulsion of the defendant. The Nabob acted "contrary to his own inclination," through fear of offending the defendant, and under his awe and influence. After such a finding, there is no room for argument. The Nabob is a mere machine, — an instrument and engine of the defendant.

NARES, J., of the same opinion, and cited Salk. 636, 640; 2 Cro. 130; Carthew, 66.

*Judgment for the plaintiff for the whole damages.*

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### MOSTYN v. FABRIGAS.

KING'S BENCH. 1775.

[*Reported Cowper's Reports*, 161.]

THIS was an action of trespass, brought in the Court of Common Pleas by Anthony Fabrigas against John Mostyn, for an assault and false imprisonment; in which the plaintiff declared, that the defendant on the first of September, in the year 1771, with force and arms, &c., made an assault upon the said Anthony, at Minorca (to wit) at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time (to wit) for the space of ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm, and against the will of the said Anthony, and compelled him to depart from Minorca aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said Anthony from Minorca aforesaid, to Carthagenas, in the dominions of the King of Spain, &c., to the plaintiff's damage of £10,000.

The defendant pleaded 1st. Not guilty; upon which issue was joined. 2dly. A special justification, that the defendant at the time, &c., and long before, was governor of the said island of Minorca, and during all that time was invested with, and did exercise all the powers, privileges, and authorities, civil and military, belonging to the government of the said island of Minorca, in parts beyond the seas; and the said Anthony, before the said time when, &c. (to wit) on the said first of September, in the year aforesaid, at the island of Minorca aforesaid, was guilty of a riot, and was endeavoring to raise a mutiny among the inhabitants of the said island, in breach of the peace: whereupon the said John so being governor of the said island of Minorca as aforesaid, at the said time, when, &c., in order to preserve the peace and government of the said island, was obliged to, and did then and there order the said Anthony to be banished from the said island of Minorca; and in order to banish the said Anthony, did then and there gently lay hands upon the said Anthony, and did then and there seize and arrest him, and did keep and detain

the said Anthony, before he could be banished from the said island, for a short space of time (to wit) for the space of six days, then next following; and afterwards, to wit, on the 7th of September, in the year aforesaid, at Minorca aforesaid, did carry, and cause to be carried, the said Anthony, on board a certain vessel, from the island of Minorca aforesaid, to Carthagera aforesaid, as it was lawful for him to do, for the cause aforesaid; which are the same making the said assault upon the said Anthony, in the first count of the said declaration mentioned, and beating, and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space of time, in the said first count of the said declaration mentioned, and compelling the said Anthony to depart from Minorca aforesaid, and carrying and causing to be carried the said Anthony from Minorca to Carthagera, in the dominions of the King of Spain, whereof the said Anthony has above complained against him, and this he is ready to verify; wherefore he prays judgment, &c., without this, that the said John was guilty of the said trespass, assault, and imprisonment, at the parish of St. Mary le Bow, in the ward of Cheap, or elsewhere, out of the said island of Minorca aforesaid. Replication de injuriâ suâ propriâ absq. tali causâ. At the trial the jury gave a verdict for the plaintiff, upon both issues, with £3000 damages, and £90 costs.<sup>1</sup>

LORD MANSFIELD. . . . The next objection which has been made is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in England.

There is a formal and a substantial distinction as to the locality of trials. I state them as different things: the substantial distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise out of the realm, there is a substantial distinction of locality too; for there are some cases that arise out of the realm, which ought not to be tried anywhere but in the country where they arise; as in the case alluded to, by Sergeant Walker: if two persons fight in France, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here: because, though it is not a criminal prosecution, it must be laid to be against the peace of the King; but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought

<sup>1</sup> Only so much of the case as involves the question of a right of action is given. — Ed.

relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But there is likewise a formal distinction, which arises from the mode of trial: for trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between transitory actions and local actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county, the place is not material; and if an imprisonment in Middlesex, it may be laid in Surrey, and though proved to be done in Middlesex, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of transitory actions is never material, except where by particular acts of parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the venue; but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an English county. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at Westminster in Middlesex, and upon producing the deed, it bears date at Bengal, the action is gone; because it is such a variance between the deed and the declaration as makes it appear to be a different instrument. There is some confusion in the books upon the stat. 6 Ric. 2. But I do not put the objection upon that statute. I rest it singly upon this ground. If the true date or description of the bond is not stated, it is a variance. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial, by a *videlicet*, in the county of Middlesex, or any other county. But no judge ever thought that when the declaration said in Fort St. George, viz. in Cheapside, that the plaintiff meant it was in Cheapside. It is a fiction of form; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the cause shall not be tried. So in the case that was long agitated and finally deter-

mined some years ago, upon a fiction of the teste of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation; because the fiction was invented for the furtherance of justice, and to make the writ appear right in form. But where the true time of suing out a *latitat* is material, as on a plea of *non assumpsit infra sex annos*, there it may be shown that the *latitat* was sued out after the six years notwithstanding the teste. I am sorry to observe, that some sayings have been alluded to, inaccurately taken down, and improperly printed, where the court has been made to say, that as men they have one way of thinking, and as judges they have another, which is an absurdity; whereas in fact they only meant to support the fiction. . . .

Can it be doubted, that actions may be maintained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the court? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in Middlesex, and then proves it to be done a thousand leagues distant on the other side of the Atlantic. There are cases of offences on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas; as the taking a ship. There is a case of that sort occurs to my memory; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before Lord Chief Justice Lee, and another before me, in which I quoted that determination, to show, that when the Lords Commissioners of prizes have given judgment, that is conclusive in the action; and likewise when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration, that the ship was taken, or seized on the high seas, *videlicet*, in Cheapside. But it cannot be seriously contended that the judge and jury who try the cause, fancy the ship is sailing in Cheapside: no, the plain sense of it is, that as an action lies in England for the ship which was taken on the high seas, Cheapside is named as a venue; which is saying no more, than that the party prays the action may be tried in London. But if a party were at liberty to offer reasons of fact contrary to the truth of the case, there would be no end of the embarrassment. At the last sittings there were two actions brought by Armenian merchants, for assaults and trespasses in the East Indies, and they are very strong authorities. Serjeant Glynn said, that the defendant Mr. Verelst was very ably assisted: so he was, and by men who would have taken the objection, if they had thought it maintainable,



and the actions came on to be tried after this case had been argued once; yet the counsel did not think it could be supported. Mr. Verelst would have been glad to make the objection; he would not have left it to a jury, if he could have stopped them short, and said, you shall not try the actions at all. I have had some actions before me, rather going further than these transitory actions; that is, going to cases which in England would be local actions: I remember one, I think it was an action brought against Captain Gambier, who by order of Admiral Boscawen had pulled down the houses of some sutlers who supplied the navy and sailors with spirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down: the captain was inattentive enough to bring the sutler over in his own ship, who would never have got to England otherwise; and as soon as he came here he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of Skinner and the East-India company was cited in support of the objection. On the other side, they produced from a manuscript note a case before Lord Chief Justice Eyre, where he overruled the objection; and I overruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice; for it was upon the coast of Nova Scotia, where there were no regular courts of judicature: but if there had been, Captain Gambier might never go there again; and, therefore, the reason of locality in such an action in England did not hold. I quoted a case of an injury of that sort in the East Indies, where even in a court of equity Lord Hardwicke had directed satisfaction to be made in damages: that case before Lord Hardwicke was not much contested, but this case before me was fully and seriously argued, and a thousand pounds damages given against Captain Gambier. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous, but I quote it for this reason; a thousand pounds damages and the costs were a considerable sum. As the captain had acted by the orders of Admiral Boscawen, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favorable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial.

I recollect another cause that came on before me; which was the case of Admiral Palliser. There the very gist of the action was local. It was for destroying fishing huts upon the Labrador coast. After the treaty of Paris, the Canadians early in the season erected huts for fishing; and by that means got an advantage, by beginning earlier, of the fishermen who came from England. It was a nice question upon the right of the Canadians. However, the admiral from general

principles of policy ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection, but it was not made. There are no local courts among the Esquimaux Indians upon that part of the Labrador coast; and therefore whatever injury had been done there by any of the King's officers would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shows, that where the reason fails, even in actions which in England would be local actions, yet it does not hold to places beyond the seas within the King's dominions. Admiral Palliser's case went off upon a proposal of a reference, and ended by an award. But as to transitory actions, there is not a color of doubt but that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas; and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion not only against the objections made, but that there does not appear a question upon which the objections could arise.

The three other judges concurred.

*Per Cur.*

*Judgment affirmed.*<sup>1</sup>

## MATTHAEI v. GALITZIN.

CHANCERY. 1874.

[*Reported Law Reports*, 18 *Equity*, 340.]

SIR R. MALINS, V. C. I think it is clear upon the face of the bill that there is no right against the company if there is none against the Princess Galitzin. They are made parties as stakeholders, and it is said they are bound to pay the princess three-fifths, subject only to the liability of paying the ten per cent commission to the plaintiff.

If, therefore, the bill fails against the princess, it must necessarily fail as against the company. That would be the case at the hearing of the cause. The bill, therefore, must be regarded as a bill against the princess. What, then, are the facts? Here is a case in which the husband of the plaintiff, who was a foreigner, entered into a contract with another foreigner respecting property situate in a foreign country. What right in such a case can there be to sue here? Can any one sue in the courts in this country in matters relating to foreign property, the contract being foreign, and both parties foreign subjects?

<sup>1</sup> *Acc. Roberts v. Dinsmuir*, 75 Cal. 203, 16 Pac. 782; *Watts v. Thomas*, 2 Bibb, 458; *Mason v. Warner*, 31 Mo. 508; *Henry v. Sargent*, 13 N. H. 321; *Ackerson v. E. R. R.*, 31 N. J. L. 309; *Lister v. Wright*, 2 Hill, 320.—Ed.

Certainly, according to my view, it is no part of the business of this court to settle disputes between foreigners. There must be some cause for giving jurisdiction to the tribunals of this country; either the property or the parties must be here, or there must be something to bring the subject-matter within the cognizance of this court. This is the case of a plaintiff who, though now stated to be living at the Charing Cross Hotel, is resident at Antwerp; and it is admitted she is a foreign subject suing another foreign subject. If I were to overrule the demurrer and allow the suit to proceed, it would under such circumstances be useless. It would be a grievous hardship if a foreigner residing in a foreign country, and having property in that country, where there are tribunals in which the rights of subjects of that country can be asserted, could be dragged into the courts of this country and be subjected to the annoyance of all the proceedings in these courts. It is certainly a jurisdiction which ought not to be exercised except in cases of absolute necessity. Then arises the question whether the plaintiff is entitled to any remedy against the princess, and if she is not, then she is not entitled as against the company.

All the cases cited go upon the same principle — such as *Blake v. Blake*, 18 W. R. 944; *Norris v. Chambers*, 29 Beav. 246, 3 D. F. & J. 583; and *Cookney v. Anderson*, 31 Beav. 452, 1 D. J. & S. 365 — and they show that you cannot sue a foreigner in this country, unless the parties are resident here or the property is situate in this country.

I find my opinion in *Blake v. Blake*, 18 W. R. 944, follows those authorities. That was a case in which the plaintiff was a foreigner resident at Boulogne, and the defendant was an Irishman, for that purpose also a foreigner, and resident in Ireland, for the sale of some land in Ireland, and the contract was entered into at Boulogne. A receiver of the property had been appointed by the Court of Chancery in Ireland, and a bill was filed in this court asking that certain deeds relating to the property might be ordered to be given up. I find that I made these observations in that case: I had no doubt that when persons who were resident here entered into a contract, though the subject-matter of the contract was abroad, yet that the contract might be sustained; but when neither party had anything to do with this country, and the subject-matter was not situated here, as in that case, then, if the plea were overruled, the court might as well be called upon to interfere in the affairs of all countries. Two Frenchmen might come here to have their disputes decided. Ireland for this purpose was a foreign country. They had a Court of Chancery of their own; and though it had been said it was not a suit to recover land, yet the effect of it was to recover an estate. I there stated that the case was, in my opinion, governed by *Cookney v. Anderson*, 31 Beav. 452, 1 D. J. & S. 365, and the circumstances of the land being in Ireland, and the defendant resident in that country, were sufficient to show that the bill ought not to have been filed in this court. So I say in this case, that neither the plaintiff nor the defendant being

resident in this country, and the subject-matter not being situate here, it is a case which this court has nothing to do with, and the demurrers must be allowed.

The last two cases which were cited — *Maunder v. Lloyd*, 2 J. & H. 718, and *Hendrick v. Wood*, 9 W. R. 588 — seem to have no application; but as far as they go they are not authorities in favor of the plaintiff, for though the parties were foreigners, the property was partly in this country.

My opinion is, therefore, that a foreigner resident abroad cannot bring another foreigner into this court respecting property with which this court has nothing to do. This court is not to be made a vehicle for settling disputes arising between parties resident abroad.

If the plaintiff asks for leave to amend, it is not a case in which I should give leave.

It was stated that leave to amend was not asked, and the demurrers were, therefore, simply allowed.<sup>1</sup>

## BRITISH SOUTH AFRICAN CO. v. COMPANHIA DE MOÇAMBIQUE.

HOUSE OF LORDS. 1893.

[*Reported* [1893] *Appeal Cases*, 602.]

IN an action by the respondents against the appellants the plaintiffs by their statement of claim alleged (*inter alia*) that the plaintiff company was in possession and occupation of large tracts of lands and mines and mining rights in South Africa; and that the defendant company by its agents wrongfully broke and entered and took possession of the said lands, mines, and mining rights, and ejected the plaintiff company, its servants, agents, and tenants therefrom; and also took possession of some of the plaintiffs' personal property and assaulted and imprisoned some of the plaintiffs.

The statement of defence in paragraph 1 — as to so much of the statement of claim as alleged a title in the plaintiff company to the lands, mines, and mining rights, and alleged that the defendants by their agents wrongfully broke and entered the same, and claimed a declaration of title and an injunction — whilst denying the alleged title and the alleged wrongful acts, said that the lands, mines, and mining rights were situate abroad, to wit in South Africa, and submitted that the court had no jurisdiction to adjudicate upon the plaintiffs' claim.

In paragraph 2 of the reply the plaintiffs objected that paragraphs 1 and 9 of the defence were bad in law, and alleged that paragraph 1

<sup>1</sup> *Acc. Brinley v. Avery*, Kirby, 25; *Lorraine v. Tourtaillier* (Brussels, 24 Mar. 1877), 5 Clunet, 511. — ED

did not show that there was any court other than that in which this action was brought having jurisdiction to adjudicate on the plaintiffs' said claims; and the plaintiffs further allege that there was no competent tribunal having jurisdiction to adjudicate on the said claims in the country where the acts complained of were committed; and that the acts complained of were illegal according to the laws of the country where the same were committed.

An order having been made for the disposal of the points of law thus raised by the pleadings, the Queen's Bench Division (Lawrance and Wright, JJ.) made an order that judgment be entered for the defendants dismissing the action so far as it claimed a declaration of title to land, and also so far as it claimed damages or an injunction in relation to trespass to land.

The Court of Appeal (Fry and Lopes, L.JJ.; Lord Esher, M. R., dissenting) declared that Her Majesty's Supreme Court has jurisdiction to entertain the claim for damages. The defendants appealed against this order.<sup>1</sup>

LORD HERSCHELL, L. C. The distinction between matters which are transitory or personal and those which are local in their nature, and the refusal to exercise jurisdiction as regards the latter where they occur outside territorial limits, is not confined to the jurisprudence of this country. Story, in his work on the Conflict of Laws (s. 551), after stating that by the Roman law a suit might in many cases be brought, either where property was situate or where the party sued had his domicile, proceeds to say that "even in countries acknowledging the Roman law it has become a very general principle that suits *in rem* should be brought where the property is situate; and this principle is applied with almost universal approbation in regard to immovable property. The same rule is applied to mixed actions, and to all suits which touch the realty."

In section 553, Story quotes the following language of Vattel: "The defendant's judge" (that is, the competent judge), says he, "is the judge of the place where the defendant has his settled abode, or the judge of the place where the defendant is when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the State in which it depends." He adds, in the next section: "It will be perceived that in many respects the doctrine here laid down coincides with that of the common law. It has been already stated that by the common law, personal actions, being transitory, may be brought in any place where the party defendant can be found; that real actions must be brought in the *forum rei sitæ*; and that mixed actions are properly re-

<sup>1</sup> The statement of facts has been abridged, and arguments and part of the opinion omitted.—Ed.

ferable to the same jurisdiction. Among the latter are actions for trespasses and injuries to real property which are deemed local; so that they will not lie elsewhere than in the place *rei sitæ*."

The doctrine laid down by foreign jurists, which is said by Story to coincide in many respects with that of our common law, obviously had relation to the question of jurisdiction, and not to any technical rules determining in what part of a country a cause was to be tried. Story was indeed regarded by one of the learned judges in the court below (Lopes, L. J., [1892] 2 Q. B. 420) as sanctioning the view that our rules with regard to venue in the case of local actions offered the only obstacle to the exercise of jurisdiction in actions of trespass to real property. The passage relied on is as follows (s. 554): "Lord Mansfield and Lord Chief Justice Eyre held at one time a different doctrine, and allowed suits to be maintained in England for injuries done by pulling down houses in foreign unsettled regions, namely, in the desert coasts of Nova Scotia and Labrador. But this doctrine has been since overruled as untenable according to the actual jurisprudence of England, however maintainable it might be upon general principles of international law, if the suit were for personal damages only."

By the words "untenable according to the actual jurisprudence of England," I do not think Story was referring to the rule which in this country regulated the place of trial in the case of local actions. Nor am I satisfied that either Lord Mansfield or Story would have regarded an action of trespass to land as a suit for personal damages only, if the title to the land were at issue; and in order to determine whether there was a right to damages it was necessary for the court to adjudicate upon the conflicting claims of the parties to the real estate. In both the cases before Lord Mansfield, as I understand them, no question of title to real property was in issue. The sole controversy was, whether the British officers sued were, under the circumstances, justified in interfering with the plaintiffs in their enjoyment of it.

The question what jurisdiction can be exercised by the courts of any country according to its municipal law cannot, I think, be conclusively determined by a reference to principles of international law. No nation can execute its judgments, whether against persons or movables or real property, in the country of another. On the other hand, if the courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication *in personam*, it is by no means certain that any rule of international law would be violated. But in considering what jurisdiction our courts possess, and have claimed to exercise in relation to matters arising out of the country, the principles which have found general acceptance amongst civilized nations as defining the limits of jurisdiction are of great weight.

It was admitted in the present case, on behalf of the respondents, that the court could not make a declaration of title, or grant an injunction to restrain trespasses, the respondents having in relation to these

matters abandoned their appeal in the court below. But it is said that the court may inquire into the title, and, if the plaintiffs and not the defendants are found to have the better title, may award damages for the trespass committed. My Lords, I find it difficult to see why this distinction should be drawn. It is said, because the courts have no power to enforce their judgment by any dealing with the land itself, where it is outside their territorial jurisdiction. But if they can determine the title to it and compel the payment of damages founded upon such determination, why should not they equally proceed *in personam* against a person who, in spite of that determination, insists on disturbing one who has been found by the court to be the owner of the property?

It is argued that if an action of trespass cannot be maintained in this country where the land is situate abroad, a wrong-doer by coming to this country might leave the person wronged without any remedy. It might be a sufficient answer to this argument to say that this is a state of things which has undoubtedly existed for centuries without any evidence of serious mischief or any intervention of the legislature; for even if the Judicature Rules have the effect contended for, I do not think it can be denied that this was a result neither foreseen nor intended. But there appear to me, I confess, to be solid reasons why the courts of this country should, in common with those of most other nations, have refused to adjudicate upon claims of title to foreign land in proceedings founded on an alleged invasion of the proprietary rights attached to it, and to award damages founded on that adjudication.

The inconveniences which might arise from such a course are obvious, and it is by no means clear to my mind that if the courts were to exercise jurisdiction in such cases the ends of justice would in the long run, and looking at the matter broadly, be promoted. Supposing a foreigner to sue in this country for trespass to his lands situate abroad, and for taking possession of and expelling him from them, what is to be the measure of damages? There being no legal process here by which he could obtain possession of the lands, the plaintiff might, I suppose, in certain circumstances, obtain damages equal in amount to their value. But what would there be to prevent his leaving this country after obtaining these damages and re-possessing himself of the lands? What remedy would the defendant have in such a case where the lands are in an unsettled country, with no laws or regular system of government, but where, to use a familiar expression, the only right is might? Such an occurrence is not an impossible, or even an improbable, hypothesis. It is quite true that in the exercise of the undoubted jurisdiction of the courts it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.

For the reasons with which I have troubled your Lordships at some length, I think the judgment appealed from should be reversed and the judgment of the Divisional Court restored, and that the respondents should pay the costs here and in the court below, and I move your Lordships accordingly.<sup>1</sup>

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### ANONYMOUS.

GENERAL COURT OF MASSACHUSETTS BAY COLONY. 1648.

[*Reported 2 Massachusetts Colonial Records, 255.*]

A QUESTION arising about the interpretation of a clause in a law, made 42, about tryall of actions, &c., viz. whether a personall action, as for battery, &c. arising upon an act committed in England, & the parties come both into this iurisdiction, whether by law we are barred from trying the action of battery in this iurisdiction, the Courte hath voted that we are not barred by that lawe, because a personall action followeth the person, & from the person onely the cause of the action ariseth.

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### GARDNER v. THOMAS.

SUPREME COURT OF NEW YORK.

[*Reported 14 Johnson's Reports, 134.*]

YATES, J., delivered the opinion of the court.<sup>2</sup> This cause comes up on certiorari to the Justices' Court in New York. The action was for an assault and battery. The defendant pleaded that the assault and battery (if any) was committed on board of a British vessel upon the high seas, and that the plaintiff and defendant were both British subjects, one the master, and the other a sailor, on board the same vessel. To this plea there was a demurrer and joinder, on which judgment was given for the plaintiff below.

The question presented by this case is, whether this court will take cognizance of a tort committed on the high seas, on board of a foreign vessel, both the parties being subjects or citizens of the country to which the vessel belongs.

<sup>1</sup> LORDS HALSBURY, MACNAGHTEN, and MORRIS concurred.

*Acc.* (in addition to the authorities cited in the dissenting opinion in *Little v. Ry.*, *infra*), *Howard v. Ingersoll*, 23 Ala. 673. See *Laird v. R. R.*, 62 N. H. 254; *Tyson v. McGuiness*, 25 Wis. 656. — ED.

<sup>2</sup> The opinion only is given; it sufficiently states the case. — ED.



It must be conceded that the law of nations gives complete and entire jurisdiction to the courts of the country to which the vessel belongs, but not exclusively. It is exclusive only as it respects the public injury, but concurrent with the tribunals of other nations, as to the private remedy. There may be cases, however, where the refusal to take cognizance of causes for such torts may be justified by the manifest public inconvenience and injury which it would create to the community of both nations ; and the present is such a case.

In *Mostyn v. Fabrigas* (Cowp. 176), Lord Mansfield, in his opinion there stated, is sufficiently explicit as to the doctrine, that for an injury committed on the high seas, circumstanced like the one now before us, an action may be sustained in the court of King's Bench ; he only appears to doubt whether an action may be maintained in England for an injury in consequence of two persons fighting in France, when both are within the jurisdiction of the court. The present action, however, is for an injury on the high seas ; and, of course, without the actual or exclusive territory of any nation.

The objection to the jurisdiction, because it must be laid in the declaration to be against the peace of the people, is not sufficient, for that is mere matter of form, and not traversable. In *Rafael v. Verelst*, 2 Black. Rep. 1058, De Grey, chief justice, says, that personal injuries are of a transitory nature, *et sequuntur forum rei* ; and though, in all declarations, it is laid *contra pacem*, yet that is only matter of form, and not traversable.

It is evident, then, that our courts may take cognizance of torts committed on the high seas, on board of a foreign vessel, where both parties are foreigners ; but I am inclined to think it must, on principles of policy, often rest in the sound discretion of the court to afford jurisdiction or not, according to the circumstances of the case. To say that it can be claimed in all cases, as matter of right, would introduce a principle which might, often times, be attended with manifest disadvantage, and serious injury to our own citizens abroad, as well as to foreigners here. Mariners might so annoy the master of a vessel as to break up the voyage, and thus produce great distress and ruin to the owners. The facts in this case sufficiently show the impropriety of extending jurisdiction, because it is a suit brought by one of the mariners against the master, both foreigners, for a personal injury sustained on board of a foreign vessel, on the high seas, and lying in port when the action was commenced, and, for aught that appears in the case, intending to return to their own country, without delay, other than what the nature of the voyage required. Under such circumstances, it is manifest that correct policy ought to have induced the court below to have refused jurisdiction, so as to prevent the serious consequences which must result from the introduction of a system, with regard to foreign mariners and vessels, destructive to commerce ; since it must materially affect the necessary intercourse between nations, by which alone it can be maintained. The plaintiff, therefore, ought to

have been left to seek redress in the courts of his own country on his return. The judgment, for these reasons, may be deemed to be improvidently rendered in the court below, and is, therefore, reversed.

*Judgment of reversal.*<sup>1</sup>

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## ROBERTS v. KNIGHTS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1863.

[*Reported 7 Allen, 449.*]

CONTRACT brought in the Police Court of Boston by the plaintiff, who is a British subject, against the master of a British vessel, who is also a British subject. The defendant objected, in the Police Court, that the court had no jurisdiction, and a hearing was thereupon had upon all the questions involved, and the case was dismissed, and the plaintiff appealed to the Superior Court.<sup>2</sup>

CHAPMAN, J. The question now presented is, whether our courts are bound to take jurisdiction of this case, both the parties being aliens, and having only a transient residence within the Commonwealth.

The Gen. Sts. do not settle the question. Not much light is thrown upon it by c. 123, § 1, cited by the plaintiff's counsel, which provides that, if neither party lives in the State, a transitory action may be brought in any county. Nor have we been able to find any provisions in any of our treaties with Great Britain which give us any aid. The

<sup>1</sup> See *Otis v. Wakeman*, 1 Hill, 604. In *Smith v. Crocker*, 14 App. Div. 245 (1897), O'Brien, J., said: "The contention that, because both the plaintiff and the defendant Crocker are non-residents, the trial court should have refused to entertain jurisdiction of the cause, we regard as equally untenable. We are referred to a number of cases (*Ferguson v. Neilson*, 33 N. Y. St. Repr. 814; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315) in which it was held that the courts of this State will not retain jurisdiction of and determine an action for tort between parties residing in other States on causes of action arising out of the State, as a matter of public policy, unless special reasons are shown to exist which make it necessary or proper so to do. An examination of the cases cited, as well as of all to which our attention has been called where that rule has been applied, were actions in tort, and not actions upon a contract. Our courts have never refused to entertain jurisdiction of a cause of action arising upon contract. In the case of *Davidson v. The Knickerbocker Life Ins. Co.* (90 N. Y. 526), it was held that as the City Court of Brooklyn was a local court, of limited jurisdiction, unless the defendants came within the classes over which the statute had conferred jurisdiction upon this court, the parties could not confer jurisdiction by consent. This case is in no respect an authority for the rule contended for by the appellants. Whether, therefore, this contract was made in California or New York — upon which question much in favor of the view that it was a New York contract might be said — we do not think it is necessary to determine; as it appears that the action was one upon contract, the court committed no error in entertaining jurisdiction of the cause." — Ed.

<sup>2</sup> Only so much of the case as involves this question is given. — Ed.

question whether the courts of a country ought to take jurisdiction of litigation between aliens, temporarily residing within its limits, is primarily one of international law.

Vattel, b. 2, c. 8. § 103, says that by the law of nations disputes that may arise between strangers, or between a stranger and a citizen, ought to be terminated by the judge of the place, and also by the laws of the place. In 2 Kent's Com. (6th ed.) 64, this authority is cited, and the law is stated to be that if strangers are involved in disputes with our citizens, or with each other, they are amenable to the ordinary tribunals of the country. No distinction is made between transient and permanent residents.

In 1650 our colonial legislature passed an act, reciting that "whereas oftentimes it comes to pass that strangers coming amongst us have sudden occasions to try actions of several natures in our courts of justice," the right is therefore given to them. 3 Col. Rec. 202. See also Anc. Chart. 91. In 1672 another act was passed, confirming and regulating the right. 4 Col. Rec. part 2, 532. See also Anc. Chart. 192. These acts make no exception of cases of transient residence, and they established our municipal law at a very early date.

In *Barrell v. Benjamin*, 15 Mass. 354, it was objected that the defendant, whose domicile was in Demerara, being transiently here, was not liable to be sued in our courts by the plaintiff, whose domicile was in Connecticut, and who was also transiently here. The precise question which arises in the present case was not before the court, but the reasoning of Parker, C. J., goes to sustain the marginal note of the case, which is as follows: "It seems that one foreigner may sue another who is transiently within the limits of this State, upon a contract made between them in a foreign country."

In *Judd v. Lawrence*, 1 Cush. 531, it was held that an alien resident within the Commonwealth is entitled to the benefit of the insolvent laws. Since St. 1852. c. 29, aliens have been able to take, hold, and transmit real estate. It seems, therefore, to be the policy of modern times to enlarge rather than diminish the rights and privileges of aliens.

The courts of the United States have not jurisdiction where both parties are aliens, because this is not one of the enumerated cases in which jurisdiction is given to them. *Barrell v. Benjamin*, *ubi supra*; *Turner v. Bank of North America*, 4 Dall. 11; *Hodgson v. Bowerbank*, 5 Cranch, 303.

The argument *ab inconvenienti*, which is urged on behalf of the defendant, has much force. It is extremely inconvenient to one who is temporarily in a foreign country to be sued by a fellow-countryman in its courts. But it is met by an argument of equal force on the other side. If the plaintiff had no such remedy, he would often be subjected to great hardships. On the whole, it is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits.

The defendant relies upon a clause in the Merchants' Shipping Act (17 & 18 Vict. c. 104), which provides that, in a contract like that of the plaintiff, no seaman shall sue for wages in any court abroad, except in cases of discharge or of danger to life.

But this act cannot affect the question of jurisdiction, which, on the motion to dismiss, is the only question to be considered.<sup>1</sup>

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BURDICK v. FREEMAN.

COURT OF APPEALS, NEW YORK. 1890.

[*Reported 120 New York, 420.*]

FOLLETT, C. J. This action, begun February 19, 1895, is for criminal conversation.<sup>2</sup> . . . After the court had concluded its charge, the defendant asked that the jury be instructed "that the plaintiff cannot maintain this action in the courts of this State, and that this court has no jurisdiction of this case." This request was refused, and the defendant excepted. This action was for the recovery of damages for a personal injury. Code Civil Proc., § 3343, subd. 9. The courts of this State may, in their discretion, entertain jurisdiction of such an action between citizens of another State actually domiciled therein when the action was begun and tried, though the injury was committed in the State of their residence and domicile. *Gardner v. Thomas*, 14 Johns. 134; *Johnson v. Dalton*, 1 Cow. 543; *Dewitt v. Buchanan*, 54 Barb. 31; *McIvor v. McCabe*, 26 How. 257; *Newman v. Goddard*, 3 Hun. 70; *Mostyn v. Fabrigas*, 2 Smith, Lead. Cas. (9th ed.), 916; *Story*, Conf. Laws, § 542; *Whart. Conf. Laws*, §§ 705, 707, 743; 4 Phillim. Int. Law, 701. The judgments in *Molony v. Dows*, 8 Abb. Pr. 316, and *Latourette v. Clark*, 30 How. Pr. 242, in so far as they hold otherwise, must be regarded as overruled. The defendant had not left the State of his residence, nor had he removed his property therefrom, when this action was begun, and we find no sufficient reason for prosecuting it in the courts of this State. But this action had been pending for a year, and the question as to whether the court should entertain jurisdiction had not been raised by answer, by special motion, or during the trial; and we think that, while the Supreme Court might, in the exercise of its discretion, have refused to entertain the action, or dismissed it on its own motion, yet the defendant, not being entitled to a dismissal as a matter of right, ought not to be permitted to lie by until the close of the trial, when its probable result could be inferred, and then successfully invoke the exercise of the discretion of the court in his favor. The judgment should be affirmed, with costs. All concur, except BRADLEY and HAIGHT, JJ., not sitting.

<sup>1</sup> *Acc. Cofrode v. Gartner*, 79 Mich. 332, 44 N. W. 623. — Ed.

<sup>2</sup> Part of the opinion is omitted. — Ed.

LITTLE v. CHICAGO, ST. PAUL, MINNEAPOLIS, AND  
OMAHA RAILWAY.

SUPREME COURT OF MINNESOTA. 1896.

*[Reported 65 Minnesota, 48.]*

MITCHELL, J. This action was brought to recover damages for injuries to real estate situated in Wisconsin, caused by the negligence of the defendant. The question presented is, can the courts of this State take cognizance of actions to recover damages to real estate lying without the State: in other words, is such an action local or transitory in its nature?

The history of the progress of the English common law respecting the locality of actions will aid in determining how this question ought to be decided on principle. Originally, all actions were local. This arose out of the constitution of the old jury, who were but witnesses to prove or disprove the allegations of the parties, and hence every case had to be tried by a jury of the vicinage, who were presumed to have personal knowledge of the parties as well as of the facts. But, as circumstances and conditions changed, the courts modified the rule in fact, although not in form. For that purpose they invented a fiction by which a party was permitted to allege, under a *videlicet*, that the place where the contract was made or the transaction occurred was in any county in England. The courts took upon themselves to determine when this fictitious averment should and when it should not be traversable. They would hold it not traversable for the purpose of defeating an action it was invented to sustain, but always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction. Those actions in which it was held not traversable came to be known as transitory, and those in which it was held traversable as local, actions. Actions for personal torts, wherever committed, and upon contracts (including those respecting lands), wherever executed, were deemed transitory, and might be brought wherever the defendant could be found.

As respects actions for injuries to real property, we cannot discover that it was definitely settled in England to which class they belonged prior to the American Revolution. As late as 1774, in the leading case of *Mostyn v. Fabrigas*, 1 Cowp. 161, 2 Smith, Lead. Cas. (9th ed.) 916, Lord Mansfield, who did more than any other jurist to brush away those mere technicalities which had so long obstructed the course of justice, referred to two cases in which he had held that actions would lie in England for injuries to real estate situated abroad. In that same case he said (at page 179, (Smith) page 936): "Can it be doubted that actions may be maintained here, not only upon contracts which follow the persons, but for injuries done by subject to subject, especially for injuries where the whole that is prayed is a

reparation in damages or satisfaction to be made by process against the person or his effects within the jurisdiction of the court?" While all that is there said as to actions for injuries to real property is obiter, yet it clearly indicates the views of that great jurist on the subject. And we cannot discover that it was fully settled in England that actions for injuries to lands were local until the decision of *Doulson v. Matthews*, 4 Term R. 503, in 1792, — sixteen years after the declaration of American independence. The courts of England seem to have finally settled down upon the rule that an action is transitory where the transaction on which it is founded might have taken place anywhere; but is local when the transaction is necessarily local, — that is, could only have happened in a particular place. As an injury to land can only be committed where the land lies, it followed that, according to this test, actions for such injuries were held to be local. As the distinction between local and transitory venues was abolished by the Judicature Act of 1873 (see 36 & 37 Vict. c. 66, Rules of Procedure, 28), we infer that actions for injuries to lands lying abroad may now be maintained in England.

It is somewhat surprising that the American courts have generally given more weight to the English decisions on the subject rendered after the Revolution than to those rendered before, and hence have almost universally held that actions for injuries to lands are local. In the leading case of *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411, which has done more than any other to mould the law on the subject in this country, Chief Justice Marshall argued against the rule, showing that it was merely technical, founded on no sound principle, and often defeated justice; but concluded that it was so thoroughly established by authority that he was not at liberty to disregard it. But so unsatisfactory and unreasonable is the rule that since that time it has, in a number of States, been changed by statute, and in others the courts have frequently evaded it by metaphysical distinctions in order to prevent a miscarriage of justice. Chief Justice Marshall's own State of Virginia changed the rule by statute as early as 1819. Some courts have made a subtle distinction between faults of omission and of commission. Thus in *Titus v. Inhabitants of Frankfort*, 15 Me. 89, which was an action against a town for damages sustained by reason of defects in a highway, it was held that, while highways must be local, the neglect of the defendant to do its duty, being a mere non-feasance, was transitory. It has also been held that where trespass upon land is followed by the asportation of timber severed from the land, if the plaintiff waives the original trespass, and sues simply for the conversion of the property so carried away, the action would become transitory. *American U. Tel. Co. v. Middleton*, 80 N. Y. 408; *Whidden v. Seelye*, 40 Me. 247. Again, it has been sometimes held that an action for injuries to real estate is transitory where the gravamen of the action is negligence, — as for negligently setting fire to the plaintiff's premises. *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun, 182;

Barney v. Burstenbinder, 7 Lans. 210. In Ohio the rule has been repudiated, at least as to causes of action arising within the State, as being wholly unsuited to their condition, because under their judicial system it would result in many cases in a total denial of justice. Genin v. Grier, 10 Ohio, 209.

Almost every court or judge who has ever discussed the question has criticised or condemned the rule as technical, wrong on principle, and often resulting in a total denial of justice, and yet has considered himself bound to adhere to it under the doctrine of *stare decisis*.

An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property. The reparation is purely personal, and for damages. Such an action is purely personal, and in no sense real. Every argument founded on practical considerations against entertaining jurisdiction of actions for injuries to lands lying in another State could be urged as to actions on contracts executed, or for personal torts committed, out of the State, at least where the subject-matter of the transaction is not within the State. Take, for example, personal actions on contracts respecting lands which are conceded to be transitory. An investigation of title of boundaries, etc., may be desirable, and often would be essential to the determination of the case, yet such considerations have never been held to render the actions local. Another serious objection to the rule is that under it a party may have a clear, legal right without a remedy where the wrongdoer cannot be found, and has no property within the State where the land is situated. As suggested by plaintiff's counsel, if the rule be adhered to, all that the one who commits an injury to land, whether negligently or wilfully, has to do in order to escape liability, is to depart from the State where the tort was committed, and refrain from returning. In such case the owner of the land is absolutely remediless.

We recognize the respect due to judicial precedents, and the authority of the doctrine of *stare decisis*; but, inasmuch as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle, and in practice often results in a total denial of justice, and has been so generally criticised by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor. If the courts of England, generations ago, were at liberty to invent a fiction in order to change the ancient rule that all actions were local, and then fix their own limitations to the application of the fiction, we cannot see why the courts of the present day should deem themselves slavishly bound by those limitations.

It is suggested that the statutes of this State, in conformity to the old rule, make actions for injuries to real property local. G. S. 1894, §§ 5182, 5183. This is true, and, strangely enough, in 1885 the Legislature went so far as to provide that, if the county designated in the complaint is not the proper one, the court should have no jurisdiction

of the action. But this statute has no application to causes of action arising out of the State. While it settles the rule and indicates the policy of this State as to actions for injuries to real property within the State, we do not think it ought to have any weight in determining what the rule should be as to causes of action arising out of the state, which can have no local venue here under the provisions of the statute. It does not appear whether the plaintiff lives in this State or in Wisconsin, but this is immaterial, for the place of his residence cannot affect the nature of the action. It is also true that in this particular case jurisdiction of the defendant could be obtained in Wisconsin, but this fact is likewise immaterial, and for the same reason. *Order reversed.*

BUCK, J. I dissent. The doctrine laid down in the foregoing opinion is conceded to be against the great weight of judicial authority, and, according to my view, is unsound in principle, and contrary to a wise public policy. The plaintiff is a citizen of the State of Wisconsin, and the defendant a railroad corporation organized under the laws of that State with its line constructed therein and extending into this State. The action is brought in Minnesota to recover for damages done by the defendant to plaintiff's real estate situate in the State of Wisconsin. In my opinion, the action is one clearly local in its nature, and not transitory, and the courts of this State have no jurisdiction over the subject-matter.

In Cooley on Torts (page 471) it is said that: — "The distinction between transitory and local actions is this: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local. Therefore, while an action of trespass to the person or for the conversion of goods is transitory, action for flowing lands is local, because they can be flooded only where they are. For the most part, the actions which are local are those brought for the recovery of real estate, or for injuries thereto or to easements. [Here the injury alleged consisted in burning the grass, roots, vegetable mould, and other material forming part of the plaintiff's land.] . . . That actions for trespasses on lands in a foreign country cannot be sustained is the settled law in England and in this country."

I am not able to state whether it has been changed by statutory enactment, and the majority opinion merely infers that it has been so changed. Blackstone, whose Commentaries were written and delivered in the form of lectures before the students of Oxford University in 1758, says (Volume 3, p. 384) that: "All over the world actions transitory follow the person of the defendant, while territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England."

The case of *Mostyn v. Fabrigas*, 1 Cowp. 161, decided in 1774, is



referred to as a leading case, yet the question here involved was not before the court in that case. There the plaintiff, Fabrigas, brought an action against Mostyn for assault and false imprisonment committed on the Island of Minorca, and it was held that the court had jurisdiction of the subject-matter. This was a transitory action, within the rules of all the courts. That a jurist as great as Lord Mansfield should inject into his opinion in that case a remark that was entirely without any relevancy to the question under consideration, adds but little force to its weight. And its force is still further lessened by the fact that ever since that decision the law of England has been settled by other eminent jurists as otherwise, and contrary to the majority opinion in this case. It seems to me misleading to call the case of *Mostyn v. Fabrigas* a leading one, and cite it as such upon an important legal question, when the point here involved was not there in issue. While the great weight of authority is manifestly against the doctrine laid down by the majority opinion, it may be well to refer to some of them more in detail.

In the case of *Allin v. Connecticut R. L. Co.*, 150 Mass. 560, 23 N. E. 581, it was held that an action of tort for breaking and entering the plaintiff's close, situated in another State, could not be brought in the Commonwealth of Massachusetts; and the court, in commenting upon the statute of that State which required actions for trespass *quare clausum* to be brought in the county where the land lies, said: "There seems to be no reason for holding that the statute renders an action for trespass to lands outside the State transitory which does not apply to an action for trespass to lands within the State." The statute has been in existence nearly 100 years, and we have not been referred to any authority or dictum to sustain the position of the plaintiff. On the contrary, the action of trespass *quare clausum* has always been treated as a local action. In the case of *Niles v. Howe*, 57 Vt. 388, it was held that trespass on the freehold would not lie in that State for a trespass committed on lands situated in the State of Massachusetts.

In *Du Breuil v. Pennsylvania Co.*, 130 Ind. 137, 29 N. E. 909, the court say an action cannot be maintained in this State for an injury to land lying in another State, caused by a railway company having a line of railroad running through this and such other State. That court also applied the same doctrine to an action for injury to land caused by fire escaping from locomotives in the case of *Indiana, B. & W. Ry. Co. v. Foster*, 107 Ind. 430, 8 N. E. 264. In the first Indiana case above cited Chief Justice Elliott says (at p. 138): "The case before us is one in which the land lies within the territory of another sovereignty, and there can be no doubt upon principle or authority that our courts have no jurisdiction." In *Eachus v. Trustees*, 17 Ill. 534, it was held that the courts of Illinois had no jurisdiction in an action to recover for injuries to land situate in Lake County, in the State of Indiana. In *Bettys v. Milwaukee & St. P. Ry. Co.*, 37

Wis. 323, it was held that an action for injury to realty situated in Iowa could not be maintained in the courts of the State of Wisconsin. Chief Justice Ryan, delivering the opinion of the court, said that it was plainly a local action under all of the authorities, which could not be maintained in the State of Wisconsin; and he cited Co. Litt. 282 a; Bac. Abr. "Action" A (p. 79); Comyn, Dig. "Action" N, 4, 5 (p. 251); *Doulson v. Matthews*, 4 Term R. 503.

In the State of New York the doctrine is well settled by numerous decisions of its highest court that suits cannot be there maintained for injuries to lands situated in other States. See *American U. Tel. Co. v. Middleton*, 80 N. Y. 408; *Cragin v. Lovell*, 88 N. Y. 258; *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703. In the last case Chief Justice Ruger, in delivering the opinion, says (at p. 451): "The doctrine that the courts of this State have no jurisdiction of actions for trespass upon lands situated in other States is too well settled to admit of discussion or dispute. . . . The claim urged by the plaintiff, that, if not permitted to maintain this action, he is without remedy for a most serious injury, is quite groundless, and affords no reason for the assumption of a jurisdiction by this court which it does not possess. The plaintiff would seem to have the same remedy for the trespasses alleged that all other parties have for similar injuries. His lands cannot be intruded upon without the presence in the State of the wrongdoer, and no reason is suggested why he could not seek his remedy against the actual wrongdoers in the courts having jurisdiction. His remedy is ample, and it is no excuse for assuming a jurisdiction which we do not have that the plaintiff desires a remedy against a particular person, rather than one against the real perpetrators of the injury, who were exposed to prosecution in the place where the wrong was committed."

This language would apply to the plaintiff in this case. The defendant is a resident of the State of Wisconsin, subject to its laws, and service of summons can there be readily and easily made upon it. The gravamen of the complaint is injury to the freehold, and the records of title to that freehold, whether in or out of the plaintiff, are accessible without trouble, and witnesses, doubtless, are obtainable without extra expense. The plaintiff is not without redress otherwise than in the courts of Minnesota. In fact it is not claimed that the courts of Wisconsin have no jurisdiction to try this action, and it is plain that they have such jurisdiction.

As a matter of policy, citizens of other States should not be permitted the use of our courts to redress wrongs and injuries to real property committed within their own territory. That is not what our courts were created or organized for. Non-residents should not be invited to bring to our courts litigation arising over injuries to real property outside of our territorial limits. Certainly there is nothing in our constitution or laws which justifies them in imposing

the burden of maintaining courts at our expense for their use and benefit. Protection of our own citizens is the primary object and duty of our own courts, and it is, to say the least, a very generous and liberal interpretation of the law which accords to suitors residing in other States the right to litigate in our courts questions of injury to real estate there situate, while the courts of those States reject the claim of our own citizens to litigate there injury to real estate situate here; notably the adjoining State of Wisconsin, which adjoins our State, and where the subject-matter of this litigation is situated. It is clearly against our interests that those living in the State of Wisconsin near the division line should be encouraged in this class of litigation because our laws may be more favorable as to the rules of evidence, or for any other cause, and thus necessitate taxation of our people that non-residents may have a forum to litigate that which ought to be and is a local action in the State of Wisconsin. Our citizens have no such right in the courts of Wisconsin. Comity should be reciprocal, and this can be more properly obtained by legislative enactments of the respective States than by an interpretation in direct conflict with the almost universal judicial decisions elsewhere. But I should seriously doubt the wisdom of any such enactment. It might, perhaps, prevent the miscarriage of justice in some cases, but it would aid such miscarriage in many instances.

The defendant, like many other railroad corporations, extends its line from other States to this, and owns a vast amount of lands here. It may allege that citizens of our State are committing injuries to its real property here, and if such a person owns land in Wisconsin, or shall be found there, it could, under such a law, commence a suit in the courts of Wisconsin, and thus put our citizens to the trouble and expense of going to that State for trial of a case which in all fairness should be tried here. Railroad companies thus situated have great facilities for transporting their witnesses over their own lines without expense to themselves, while a poor man, charged, perhaps unjustly, with a trespass, must travel hundreds of miles into another State to meet his accusers, or suffer judgment by default. The majority opinion means defeat for the railroad company in this case, but it would mean victory for them hereafter if an alleged trespasser upon their lands in Minnesota is caught in Wisconsin and made to answer in its courts, if such a law should prevail there. Now citizens of Wisconsin will have an unjust advantage over citizens of Minnesota. Again, suppose the courts of California should adopt the doctrine of the majority opinion, and one of our citizens should visit that State for pleasure, health, or business, and is there sued by some one claiming that lands belonging to him situate here have been damaged by such citizen of Minnesota, would it not seem a miscarriage of justice that the trial in such case must take place thousands of miles away from the man's home, and from the situs of

the property alleged to have been injured? The hardship of such a proceeding would seem to be intolerable, and I cannot give my assent to any such doctrine, whatever may be the rule as to the trial of actions upon voluntary contracts between parties; and I prefer that the rule should be that for injuries to real property the jurisdiction of our courts should only be co-extensive with its territorial sovereignty.

This doctrine, which is so strongly imbedded in the common law and judicial authorities of the country, is further adhered to by our own statute, which provides that actions for injuries to real property shall be brought in the county where the subject of the action is situated, and prohibits the court from having jurisdiction if brought in any other county. G. S. 1894, § 5183. Thus we have a legislative recognition of the doctrine that actions for injuries to real estate are local. If there is any implication arising from legislative enactments as to the jurisdiction of courts to try actions for injury to real estate elsewhere, it would be against the contention of the plaintiff. The statute makes no distinction between trespass to lands within and without the State. It does not make the action for trespass to lands outside the State transitory. There is no warrant in the language of the Constitution or statute which justifies the majority opinion, and, if sound, it must rest upon some other foundation than is to be found in the letter of the law. It is a rule which is more favorable to the plaintiff than the defendant. The former can select his own forum; the latter is helpless. No change of venue can be granted, because none is authorized.

In criminal cases the doctrine of local venue applies. One of the specifications of complaint in the immortal Declaration of Independence against Great Britain was, "For transporting us beyond seas to be tried for pretended offences." Our Constitution (article 1, § 6) provides that: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law." No one pretends but that this is a sound and reasonable principle of law, and I have never known of its being assailed as tending to a miscarriage of justice. This constitutional guaranty applies to petty offences wherever a small fine might be imposed, and yet where, perhaps, all the property which a man owns might be at stake, he can, if found in another State, perhaps thousands of miles away from home and witnesses and the location of the alleged injured property, be tried civilly in a foreign sovereignty. Why could he not also in a civil action be tried in China, Russia, England, Spain, Cuba, or Mexico, if found there, and there served with process, if the doctrine of the majority opinion is to prevail? In the case of *Niles v. Howe*, 57 Vt. 388, the court say: "It would hardly be claimed that our courts had jurisdiction over a crime committed in

another State. And yet the same reasoning that supports the doctrine of local venue applies equally to crimes and real actions."

I think that the order should be affirmed.

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MEXICAN NATIONAL RAILROAD v. JACKSON.

SUPREME COURT OF TEXAS. 1896.

[*Reported 89 Texas, 107.*]

BROWN, J.<sup>1</sup> The plaintiff in error is a corporation operating a line of railroad in the republic of Mexico, which extends into the State of Texas. The defendant in error was in the employ of that railroad company in the republic of Mexico, and, while engaged in the performance of duties as such employee, was injured at the station of La Ventura, in the said republic.

The trial court rendered judgment for the plaintiff in that court, J. O. Jackson, for the sum of \$5,000, from which appeal was taken, and the judgment affirmed by the Court of Civil Appeals.

The law of Mexico, under which plaintiff's claim originated, having been pleaded and proved by the defendant, the rights of the parties must be determined by its provisions: "It would be as unjust to apply a different law, as it would be to determine the rights of the parties by a different transaction." Story, *Confl. Laws*, p. 38. This is a transitory action, and may be maintained in any place where the defendant is found, if there be no reason why the court whose jurisdiction is invoked should not entertain the action. The plaintiff, however, has no legal right to have his redress in our courts; nor is it specially a question of comity between this State and the government of Mexico, but one for the courts of this State to decide, as to whether or not the law by which the right claimed must be determined is such that we can properly and intelligently administer it, with due regard to the rights of the parties. *Gardner v. Thomas*, 14 Johns. 134; *Johnson v. Dalton*, 1 Cow. 543. The decisions of this court (well sustained by high authority) establish the doctrine that the courts of this State will not undertake to adjudicate rights which originated in another State or country, under statutes materially different from the law of this State in relation to the same subject. *Railway Co. v. McCormick*, 71 Tex. 660; *Railway Co. v. Richards*, 68 Tex. 375. Many difficulties would present themselves, in an attempt to determine the meaning of the Mexican law, and to apply it in giving redress to the parties claiming rights under it. We understand the Mexican courts are not governed by precedent, and we have no access to reports of adjudicated cases of those courts, from which we could ascertain their interpretation of these laws. The language of some of the articles quoted is

<sup>1</sup> Part of the opinion is omitted. — Ed.

ambiguous, and we find great difficulty in determining what would be a proper interpretation of the law. We might or might not give the same effect to the language that is given to it in the courts of Mexico. There could be no reasonable certainty that the parties' rights would be adjusted here as they would be if the case were tried in the courts of that country, which is their right; for it is well settled that, if one State undertakes to enforce a law of another State, the interpretation of that law as fixed by the courts of the other State is to be followed. This difficulty of itself furnishes a sufficient reason for the courts of this State to decline to assume jurisdiction of this class of cases. . . .

There are other sufficient reasons why our courts should not attempt to enforce the Mexican law in cases like this. The reason which influences the courts of one State to permit transitory actions for torts to be maintained therein, when the right accrued in a foreign State or country, is that the defendant, having removed from such other State or country, cannot be subjected to the jurisdiction of the courts where the cause of action arose, and as matter of comity, but more especially to promote justice, the courts of the place where he is found will enforce the rights of the injured party against him because it would be unjust that the wrongdoer should be permitted, by removing from the country where he inflicted the injury, to avoid reparation for the wrong done by him. In this case there has been no removal of the person or property of the defendant. Its railroad remains, as it was at the time of the injury, within the jurisdiction of the courts of Mexico, and it is liable to suit there according to the laws of that country. The reason for permitting the action to be prosecuted in our courts does not obtain in this case. The plaintiff has voluntarily resorted to the jurisdiction of our courts, when his rights could be better adjudicated in Mexico. The Mexican National Railroad is an important public highway in the republic of Mexico, by which the commerce of that country is largely carried on with our people. Every judgment for damages rendered against it reduces its revenues, which must, of necessity, be restored through its charges for transportation of persons and property, and, in the main, must be paid by that people. It is but just, and perhaps necessary to a proper maintenance of that means of transportation, that the country in which it is operated should determine the charges to be enforced against it. If Texas should open her courts to all persons that may be injured in Mexico in the management of that railroad and others, it may seriously affect the means of commerce between this State and that republic. Thus it becomes a matter of public concern, and a proper subject for our consideration in this connection, in view of the fact that the railroad company is still subject to that jurisdiction. Justice does not demand the exercise of the jurisdiction, and comity between the governments of this State and Mexico would seem to forbid that we should do so. *Gardner v. Thomas*, 14 Johns. 134; *Johnson v. Dalton*, 1 Cow. 543. There are at this time two systems of railroads extending from the borders of this State into Mexico, for

several hundred miles each; and as that country shall hereafter develop, and commerce between the two countries become more extended, we may expect other lines to be constructed in the same direction. If our courts assume to adjust the rights of parties against those railroads, growing out of such facts as in this case, we will offer an invitation to all such persons who might prefer to resort to tribunals in which the rules of procedure are more certainly fixed, and the trial by jury secured, to seek the courts of this State to enforce their claims. Thus we would add to the already overburdened condition of our dockets in all the courts, and thereby make the settlement of rights originating outside the State, under the laws of a different government, a charge upon our own people. If the facts showed that this was necessary in order to secure justice, and the laws were such as we could properly enforce, this consideration would have but little weight; but we feel that it is entitled to be considered where the plaintiff chooses this jurisdiction as a matter of convenience and not of necessity. We conclude that the District Court and the Court of Civil Appeals erred in not dismissing this case, under the proof made, for which error the judgments of both of said courts are reversed, and this cause is dismissed.<sup>1</sup>

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VANGUILBERT *v.* VANDEVIERE.

CIVIL TRIBUNAL OF LILLE. 1855.

[Reported 12 *Chnet*, 291.]

THE TRIBUNAL. Vandeviere, sued by Vanguilbert in debt for butcher's-meat, denied the jurisdiction of the court for the reason that it was a suit between foreigners, of a personal and transitory nature. No authorization was shown for the parties to establish their domicile in France; but both had engaged in commerce there for several years, and may be considered as having their domicile there, and as having reciprocally submitted themselves, as to the execution of their obligations, to the jurisdiction of the French courts. For these reasons the plea to the jurisdiction is overruled.

<sup>1</sup> But see *Mexican Central Ry. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282. In that case Fly, J., said: "Our courts either have jurisdiction of the class of cases we are discussing, or they have not; and the question of whether a man has voluntarily resorted to our courts, or been forced into them, or whether commerce between Mexico and Texas will be injured or protected by compelling the payment by a corporation of damages for the wrongs it has inflicted, or the condition of our dockets, can have no weight or force in determining jurisdiction. These are considerations that might possibly address themselves to the notice of legislatures, but not to the determination of courts. Courts are not at liberty to assume or decline jurisdiction upon speculative grounds, or for reasons of public policy. *Percival v. Hickey*, 18 Johns. 257."

See also *Evey v. Mexican Central Ry.*, 81 Fed. 294; *Western Union Tel. Co. v. Clark*, 14 Tex. Civ. App. 563, 38 S. W. 225. — ED.

## KOWALSKI v. MOCALUVO.

CIVIL TRIBUNAL OF THE SEINE. 1885.

[Reported 12 *Clunet*, 176.]

M. KOWALSKI, residing at Paris, in right of the firm of Hertz, sued *Sieur Mocaluvo*, a foreigner residing in France, for the sum of 375 francs, being the rent of a piano. M. Mocaluvo set up a plea to the jurisdiction, on the ground that the suit was between two foreigners. The Tribunal overruled the plea.

THE TRIBUNAL. Though as a general rule the French courts, having been established to judge the disputes of natives, have no jurisdiction to determine suits between foreigners not authorized to reside in France, it is different when, in a question involving acts of commerce, the foreign defendant has accepted the jurisdiction of the French courts, either expressly or by implication.

In hiring a piano at the Hertz establishment, Mocaluvo has obviously elected at Paris a domicile for the execution of his contract, and has submitted to the jurisdiction of the French courts; especially since he cannot indicate a foreign domicile where he may be sued, alleging only that he was born in Sicily. Kowalski, substituted, by judgment of the Tribunal of Commerce of Paris, 22 June, 1882, to the rights of the firm of Hertz against Mocaluvo, may sue him before the Tribunal of the Seine.

This firm, and its successor Kowalski, did an act of commerce in letting and eventually selling a piano to Mocaluvo. France, in permitting foreigners to establish themselves within her territory and there to engage in commerce, assures them by implication her protection for the enforcement of contracts good by the law of nature made between them within her territory, while engaged in commerce. It would be otherwise if the suit concerned the personal status of foreigners and the application of the laws of their own countries.

For these reasons the Tribunal declares itself competent, condemns Mocaluvo to the costs of this hearing, and continues the case for hearing on the merits.



## CHAPTER V.

### PROCEDURE.

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#### DE LA VEGA *v.* VIANNA.

KING'S BENCH. 1830.

[*Reported* 1 *Barnewall & Adolphus*, 284.]

LORD TENTERDEN, C. J.<sup>1</sup> This was an application to discharge the defendant, who had been arrested upon mesne process, out of custody on filing common bail. The plaintiff and defendant were both foreigners; the debt was contracted in Portugal, and it appears that, by the law of that country, the defendant would not have been liable to arrest. It is contended on the authority of *Melan v. The Duke de Fitzjames*, 1 B. & P. 139, that he is entitled to the relief now sought. We are, however, of opinion, that he is not. In the case just mentioned, the distinction taken by Mr. Justice Heath, who differed from the other judges, was, that in construing contracts the law of the country in which they are made must govern, but that the remedy upon them must be pursued by such means as the law points out where the parties reside. This doctrine is said to correspond with the opinions of Huber and Voet. I have not had an opportunity of looking into those authorities, but we think, on consideration of the present case, that the distinction laid down by Mr. Justice Heath ought to prevail. A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to. The rule must be discharged.

*Rule discharged.*<sup>2</sup>

<sup>1</sup> The opinion only is given; it sufficiently states the case. — Ed.

<sup>2</sup> *Acc.* *Imlay v. Ellefsen*, 2 East, 453; *Atwater v. Townsend*, 4 Conn. 47; *Smith v. Spinolla*, 2 Johns. 198; *Anon.* (Austria, 12 Dec. 1876), 8 Clunet, 176. — Ed.

## BULLOCK v. CAIRD.

QUEEN'S BENCH. 1875.

[*Reported Law Reports, 10 Queen's Bench, 276.*]

ACTION by the plaintiffs against the defendant for the breach of an agreement to build a ship.

The material part of the agreement, which was set out in the declaration, was as follows : —

“ Glasgow, July 15th, 1874. Messrs. Caird & Co., shipbuilders, Greenock, agree to build for Messrs. James and George Bullock & Co., London, who agree to accept an iron sailing ship of the following dimensions, &c.” Throughout the agreement the parties were mentioned as Caird & Co. and Bullock & Co.

Plea, that there was a trading partnership or firm domiciled and carrying on business in Scotland by the name of Caird & Co., and the alleged agreement was an agreement made in Scotland by the plaintiffs with the firm, and was to be performed wholly in Scotland without the jurisdiction of the English courts and within the jurisdiction of the Scotch courts, and by the law of Scotland the firm was and is a separate and distinct person from any or the whole of the individual members of whom it consists and of whom the defendant was and is one, and the firm, by the law of Scotland, is capable of maintaining the relation of debtor and creditor separate and distinct from the obligation of the partners as individuals, and can hold property, and has the capacity of suing and being sued as such separate person by its name of Caird & Co., and the alleged agreement was made by the firm as such separate person and not jointly and severally by the individual members thereof; that at the date of the agreements the firm consisted of certain individuals, namely, the defendant James Tennant Caird and Patrick Tennant Caird, and has always since consisted and still consists of the same members, and the firm and each of its individual members then was and always since has been and still is domiciled and carrying on business in Scotland, and within and subject to the jurisdiction of the Scotch courts and possessed of sufficient property and funds, within and subject to the jurisdiction to answer in full the claim of the plaintiffs; that by the law of Scotland the defendant became and was, as a partner of the firm of Caird & Co., on the making of the agreement, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual partners thereof jointly for any breaches of the agreement; and save as aforesaid no liability by the law of Scotland attached or attaches to the defendant in respect of the agreement; that by the law of Scotland it is a condition precedent to any individual liability attaching to the defendant or any individual members of the firm in respect of the agreements that the firm as such person as aforesaid or the whole individual partners thereof jointly

should first have been sued, and that judgment should have been recovered against the firm or the whole of the said partners jointly, and that the plaintiffs have not sued the firm of Caird & Co. nor the whole of the partners jointly, nor recovered judgment against it or them.

Demurrer to the plea and joinder.<sup>1</sup>

BLACKBURN, J. It is quite clear that the firm of Caird & Co. are not a body corporate. The plea alleges that the firm, or the whole individual partners thereof jointly, should first have been sued. If one of the members of the firm was not joined it might be a bar to an action in Scotland, but it could only be pleaded in abatement in an action in England. I think all the matters stated in the plea are mere matter of procedure, and that the plea is bad.

MELLOR and FIELD, JJ., concurred.

*Judgment for the plaintiffs.*<sup>2</sup>

## LE ROY v. BEARD.

SUPREME COURT OF THE UNITED STATES. 1849.

[*Reported 8 Howard's Reports, 451.*]

WOODBURY, J.<sup>3</sup> This was an action of assumpsit for money had and received; and also counting specially, that, on the 17th of November, 1836, the original defendant, Le Roy, in consideration of \$1,800 then paid to him by the original plaintiff, Beard, caused to be made to the latter, at Milwaukee, Wisconsin, a conveyance, signed by Le Roy and his wife, Charlotte. This conveyance was of a certain lot of land situated in Milwaukee, and contained covenants that they were seized in fee of the lot, and had good right to convey the same. Whereas it was averred, that, in truth, they were not so seized, nor authorized to convey the premises, and that thereby Le Roy became liable to repay the \$1,800.

Under several instructions given by the Circuit Court for the Southern District of New York, where the suit was instituted, the jury found a verdict for the original plaintiff, on which judgment was rendered in his favor, and which the defendant now seeks to reverse by writ of error. Among those instructions, which were excepted to by the

<sup>1</sup> Arguments of counsel are omitted. — Ed.

<sup>2</sup> *Acc. Taft v. Ward*, 106 Mass. 518; *Henry Briggs Sons & Co. v. Niven* (Antwerp, 22 July, 1893), 21 Clunet, 1080. See *Carnegie v. Morrison*, 2 Met. 381. So of the question whether an assignee of a *chose in action* may sue in his own name. *Roosa v. Crist*, 17 Ill. 450; *Foss v. Nutting*, 14 Gray, 484; *Lodge v. Phelps*, 2 Cal. Cas. 321; see *Levy v. Levy*, 78 Pa. 507. Whether an assignee for creditors may sue in his own name. *Glenn v. Marbury*, 145 U. S. 499; *Osborn v. First Nat. Bank*, 175 Pa. 494, 34 Atl. 858. So of suit by a married woman in her own name. *Stoneman v. Erie Ry.*, 52 N. Y. 429. — Ed.

<sup>3</sup> Part of the opinion only is given. — Ed.

defendant, and are at this time to be considered, was, first, that "the action of assumpsit is properly brought in this court, upon the promises of the defendant contained in the deed, if any promises are made therein which are binding or obligatory on the defendant."

The conveyance in this case was made in the State of Wisconsin, and a scrawl or ink seal was affixed to it, rather than a seal of wax or wafer. By the law of that State, it is provided, that "any instrument, to which the person making the same shall affix any device, by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed."

But in the State of New York it has been repeatedly held (as in *Warren v. Lynch*, 5 Johns. 239) that, by its laws, such device, without a wafer or wax, are not to be deemed a seal, and that the proper form of action must be such as is practised on an unsealed instrument in the State where the suit is instituted, and the latter must therefore be assumpsit. 12 Johns. 198; 2 Hill, 228, 544; 3 Hill, 493; 1 Denio, 376; 5 Johns. 329; *Andrews et al. v. Herriott*, 4 Cowen, 508, overruling *Meridith v. Hinsdale*, 2 Caines, 362; 4 Kent, 451; 8 Peters, 362; *Story's Conflict of Laws*, 47. A like doctrine prevails in some other States. 3 Gill & Johns. 234; *Douglas et al. v. Oldham*, 6 N. H. 150.

It becomes our duty, then, to consider the instruction given here, in an action brought in the Circuit Court of New York, as correct in relation to the form of the remedy. It was obliged to be in assumpsit in the State of New York, and one of the counts was special on the promise contained in the covenant. We hold this, too, without impairing at all the principle, that, in deciding on the obligation of the instrument as a contract, and not the remedy on it elsewhere, the law of Wisconsin, as the *lex loci contractus*, must govern. *Robinson v. Campbell*, 3 Wheat. 212.<sup>1</sup>

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### HAMILTON v. SCHOENBERGER.

SUPREME COURT OF IOWA. 1877.

[Reported 47 Iowa, 385.]

THE petitioner alleges that a judgment had been entered against him in the Benton District Court on a "judgment note," upon confession of judgment by an attorney of the court, not authorized to appear for him except by the power contained in the note; and asks that the judgment be declared void and cancelled. The defendants demurred to this petition. The demurrer was overruled, and judgment was rendered can-

<sup>1</sup> *Acc. Thrasher v. Everhart*, 3 G. & J. 234; *Broadhead v. Noyes*, 9 Mo. 55; *Andrews v. Herriott*, 4 Cow. 508. See *Williams v. Haines*, 27 Ia. 251. — Ed.

celling the judgment in favor of defendants against plaintiff. The defendants appeal.<sup>1</sup>

DAY, C. J. So far as we are advised it has never been the understanding of the profession nor of the business community in this State that warrants of attorney to confess judgment had any place in our law. A confession of judgment pertains to the remedy. A party seeking to enforce here a contract made in another State must do so in accordance with the laws of this State. Parties cannot by contract made in another State engraft upon our procedure here remedies which our laws do not contemplate nor authorize.

We are fully satisfied that the demurrer to the petition was properly overruled. *Affirmed.*

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MINERAL POINT RAILROAD CO. v. BARRON.

SUPREME COURT OF ILLINOIS. 1876.

[Reported 83 Illinois, 365.]

CRAIG, J.<sup>2</sup> Under the laws of Wisconsin, had the proceedings been instituted in that State, the wages of the defendant in the original action were exempt from garnishment, and it is urged by appellant, that, as the parties resided in that State and the debt was there incurred, the exemption laws of Wisconsin must control, although the proceedings for the collection of the debt were commenced in this State.

It is true, the validity of a contract is to be determined by the law of the place where it is made, but the law of the remedy is no part of the contract, as is well said by Parsons on Contracts, vol. 2, page 588: "But on the trial, and in respect to all questions as to the forms or methods, or conduct of process or remedy, the law of the place of the forum is applied."

In *Sherman v. Gassett*, 4 Gilman, 521, after referring to a number of cases in illustration of the rule, it is said: "The cases above referred to, although not precisely analogous, yet settle the principle that the *lex loci* only governs in ascertaining whether the contract is valid, and what the words of the contract mean. When the question is settled that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in framing it, the *lex loci* ceases, and the *lex fori* steps in and determines the time, the mode, and the extent of the remedy."

Statutes of limitations fixing the time within which an action may be brought, laws providing for a set-off in certain actions, and statutes providing that certain articles of personal property, wearing apparel,

<sup>1</sup> The statement of facts has been abridged, and part of the opinion omitted. — Ed.

<sup>2</sup> Part of the opinion only is given. — Ed.

farming implements, and the tools of a mechanic shall be exempt from levy and sale upon execution, have always, so far as our observation goes, been regarded by courts as regulations affecting the remedy which might be enacted by each State, as the judgment of the legislature might think for the best interests of the people thereof. *Bronson v. Kinzie*, 1 Howard, 311.

The statute of Wisconsin, under which appellant was not liable to be garnisheed, was a law affecting merely the remedy where an action should be brought in the courts of that State. That law, however, cannot be invoked where the remedy is sought to be enforced in the courts of this State. The remedy must be governed by the laws of the State where the action is instituted.<sup>1</sup>

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### GIBBS v. HOWARD.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE. 1820.

[*Reported 2 New Hampshire*, 296.]

THIS was an action of assumpsit upon a note of hand, dated September 29, 1817, for \$57, made by Howard, and payable to Almon Burgess, or order, in the month of April, 1818; and on the 31st of October, 1817, indorsed by Burgess to Patience Cone, then sole, now the wife of Gibbs, the plaintiff.

The defendant pleaded the general issue, and gave notice of a set-off consisting of three notes of hand, made by Almon Burgess, and payable to three several persons, and by them indorsed to the defendant, November 1, 1817.

The cause was submitted to the decision of the court upon the following facts. The note described in the declaration was made by Howard, and at the time when made, the original parties to it were both inhabitants of the State of Vermont. The same note was for a valuable consideration indorsed to Patience Cone, then an inhabitant of Vermont, before it became due, and before the defendant had any inter-

<sup>1</sup> *Acc. Chic., R. I. & P. Ry. v. Sturm*, 174 U. S. 170; *Boykin v. Edwards*, 21 Ala. 261; *Broadstreet v. Clark*, 65 Ia. 670; *B. & M. R. R. v. Thompson*, 31 Kan. 180, 1 Pac. 622; *Morgan v. Neville*, 74 Pa. 52. But see *Mo. P. Ry. v. Sharitt*, 43 Kan. 385, 23 Pac. 430; *Drake v. L. S. & M. S. Ry.*, 69 Mich. 168, 179, 37 N. W. 70. In the last case, *Morse, J.*, said: "It must be held, I think, not only as a matter of simple justice, but as sound law, which means justice, that where the creditor, debtor, and garnishee, at the time of the creation of both debts, are all residents and doing business in Indiana, and both debts are created, and intended to be payable, in that State, the exemption of wages is such an incident and condition of the debt from the employer that it will follow the debt, if the debt follows the person of the garnishee into Michigan, and attach itself to every process of collection in this State, unless jurisdiction is obtained over the person of the principal debtor; that it becomes a vested right *in rem*, which follows the debt into any jurisdiction where the debt may be considered as going.—ED.

est in the notes mentioned in the set-off. Gibbs is an inhabitant of Massachusetts. There is a statute of Vermont, passed on the 31st October, 1798, by which it is enacted, "that in all actions on indorsed notes it shall be lawful for the defendant to plead an offset of all demands proper to be plead in offset which the defendant may have against the original payee, before notice of such an indorsement against the indorsee, and may also plead or give in evidence on the trial of any such action, any matter or thing which would equitably discharge the defendant in an action brought in the name of the original payee."

And it was agreed, that if the court should be of opinion that the defendant could not avail himself of the set-off filed in the case, judgment should be rendered for the plaintiffs for the amount of the note described in the declaration.

By THE COURT. It is very clear that the notes, which the defendant holds against Burgess, are not a legal set-off in this action by the laws of this State; and it is equally clear, that we can take no notice of the statute of Vermont. The *lex loci* must settle the nature, validity, and interpretation of contracts, but it extends no further. The laws of the State in which contracts are attempted to be enforced, must settle what is the proper course of judicial proceedings to enforce them. The statute of Vermont relates merely to the remedy, by which a contract may be enforced. There must, therefore, according to the agreement of the parties, be

*Judgment for the plaintiff.*<sup>1</sup>

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### TOWNSEND v. JEMISON.

SUPREME COURT OF THE UNITED STATES. 1849.

[Reported 9 Howard's Reports, 407.]

WAYNE, J.<sup>2</sup> This suit has been brought here from the District Court of the United States for the Middle District of Alabama. The defendant in the court below, the plaintiff here, besides other pleas, pleaded that the cause of action accrued in Mississippi more than three years before the suit was brought; and that the Mississippi statute of limitations barred a recovery in the District Court of Alabama. The plaintiff demurred to the plea. The court sustained the demurrer.

We do not think it necessary to do more than to decide this point in the case.

The rule in the courts of the United States, in respect to pleas of the statutes of limitation, has always been, that they strictly affect the

<sup>1</sup> *Acc.* Meyer v. Dresser, 16 C. B. N. s. 646 (*scilicet*); Savery v. Savery, 3 Ia. 271; Davis v. Morton, 5 Bush, 160. — Ed.

<sup>2</sup> The opinion only is given; it sufficiently states the case. — Ed.

remedy, and not the merits. In the case of *McElmoyle v. Cohen*, 13 Peters, 312, this point was raised, and so decided. All of the judges were present and assented. The fullest examination was then made of all the authorities upon the subject, in connection with the diversities of opinion among jurists about it, and of all those considerations which have induced legislatures to interfere and place a limitation upon the bringing of actions.

We thought then, and still think, that it has become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought, — the *lex fori*; otherwise the suit would be barred, unless the plaintiff can bring himself within one of the exceptions of the statute, if that is pleaded by the defendant. This rule is as fully recognized in foreign jurisprudence as it is in the common law. We then referred to authorities in the common law, and to a summary of them in foreign jurisprudence. Burge's Com. on Col. and For. Laws. They were subsequently cited, with others besides, in the second edition of the Conflict of Laws, 483. Among them will be found the case of *Leroy v. Crowninshield*, 2 Mason, 151, so much relied upon by the counsel in this case.

Neither the learned examination made in that case of the reasoning of jurists, nor the final conclusion of the judge, in opposition to his own inclinations, escaped our attention. Indeed, he was here to review them, with those of us now in the court who had the happiness and benefit of being associated with him. He did so with the same sense of judicial obligation for the maxim, *Stare decisis et non quieta movere*, which marked his official career. His language in the case in Mason fully illustrates it: "But I do not sit here to consider what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and juridical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides in whose judgment the most implicit confidence might not have been originally reposed." Then follows this declaration: "It does appear to me that the question now before the court has been settled, so far as it could be, by authorities which the court is bound to respect." The error, if any has been committed, is too strongly engrafted into the law to be removed without the interposition of some superior authority. Then, in support of this declaration, he cites Huberus, Voet, Pothier, and Lord Kames, and adjudications from English and American courts, to show that, whatever may have been the differences of opinion among jurists, the uniform administration of the law has been, that the *lex loci contractus* expounds the obligation of contracts, and that statutes of limitation prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertain *ad tempus et modum actionis instituende* and not *ad valorem contractus*. Williams v.



Jones, 13 East, 439; Nash v. Tupper, 1 Caines, 402; Ruggles v. Keeler, 3 Johns. 263; Pearsall v. Dwight, 2 Mass. 84; Deconche v. Savetier, 3 Johns. Ch. 190, 218; McCluny v. Silliman, 3 Peters, 276; Hawkins v. Barney, 5 Peters, 457; Bank of the United States v. Donnally, 8 Peters, 361; McElmoyle v. Cohen, 13 Peters, 312.

There is nothing in *Shelby v. Guy*, 11 Wheaton, 361, in conflict with what this court decided in the four last-mentioned cases. Its action upon the point has been uniform and decisive. In cases before and since decided in England, it will be found there has been no fluctuation in the rule in the courts there. The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* cannot be. 2 Binghams, New Cases, 202, 211; *Don v. Lippman*, 5 Clark & Fin. 1, 16, 17. It has become, as we have already said, a fixed rule of the *jus gentium privatum*, unalterable, in our opinion, either in England or in the States of the United States, except by legislative enactment.

We will not enter at large into the learning and philosophy of the question. We remember the caution given by Lord Stair in the supplement to his *Institutes* (p. 852), about citing as authorities the works and publications of foreign jurists. It is appropriate to the occasion, having been written to correct a mistake of Lord Tenterden, to whom no praise could be given which would not be deserved by his equally distinguished contemporary, Judge Story. Lord Stair says: "There is in *Abbott's Law of Shipping* (5th edition, p. 365) a singular mistake; and, considering the justly eminent character of the learned author for extensive, sound, and practical knowledge of the English law, one which ought to operate as a lesson on this side of the Tweed, as well as on the other, to be a little cautious in citing the works and publications of foreign jurists, since, to comprehend their bearings, such a knowledge of the foreign law as is scarcely attainable is absolutely requisite. It is magnificent to array authorities, but somewhat humiliating to be detected in errors concerning them; — yet how can errors be avoided in such a case, when every day's experience warns us of the prodigious study necessary to the attainment of proficiency in our own law? My object in adverting to the mistake in the work referred to is, not to depreciate the author, for whom I entertain unfeigned respect, but to show that, since even so justly distinguished a lawyer fails when he travels beyond the limits of his own code, the attempt must be infinitely hazardous with others."

We will now venture to suggest the causes which misled the learned judge in *Leroy v. Crowninshield* into a conclusion, that, if the question before him had been entirely new, his inclination would strongly lead him to declare, that where all remedies are barred or discharged by the *lex loci contractus*, and have operated upon the case, then the bar may be pleaded in a foreign tribunal, to repel any suit brought to enforce the debt.

We remark, first, that only a few of the civilians who have written upon the point differ from the rule, that statutes of limitation relate to the remedy and not to the contract. If there is any case, either in our own or the English courts, in which the point is more discussed than it is in *Leroy v. Crowninshield* we are not acquainted with it. In every case but one, either in England or in the United States, in which the point has since been made, that case has been mentioned, and it has carried some of our own judges to a result which Judge Story himself did not venture to support.

We do not find him pressing his argument in *Leroy v. Crowninshield* in the Conflict of Laws, in which it might have been appropriately done, if his doubts, for so he calls them, had not been removed. Twenty years had then passed between them. In all that time, when so much had been added to his learning, really great before, that by common consent he was estimated in jurisprudence *par summis*, we find him, in the Conflict of Laws, stating the law upon the point in opposition to his former doubts, not in deference to authority alone, but from declared conviction.

The point had been examined by him in *Leroy v. Crowninshield* without any consideration of other admitted maxims of international jurisprudence, having a direct bearing upon the subject. Among others, that the obligation of every law is confined to the State in which it is established, that it can only attach upon those who are its subjects, and upon others who are within the territorial jurisdiction of the State; that debtors can only be sued in the courts of the jurisdiction where they are; that all courts must judge in respect to remedies from their own laws, except when conventionally, or from the decisions of courts, a comity has been established between States to enforce in the courts of each a particular law or principle. When there is no positive rule, affirming, denying, or restraining the operation of foreign laws, courts establish a comity for such as are not repugnant to the policy or in conflict with the laws of the State from which they derive their organization. We are not aware, except as it has been brought to our notice by two cases cited in the argument of this cause, that it has ever been done, either to give or to take away remedies from suitors, when there is a law of the State where the suit is brought which regulates remedies. But for the foundation of comity, the manner of its exercise, and the extent to which courts can allowably carry it, we refer to the case of the *Bank of Augusta v. Earle*, 13 Peters, 519, 589; Conflict of Laws, *Comity*.

From what has just been said, it must be seen, when it is claimed that statutes of limitation operate to extinguish a contract, and for that reason the statute of the State in which the contract was made may be pleaded in a foreign court, that it is a point not standing alone, disconnected from other received maxims of international jurisprudence. And it may well be asked, before it is determined otherwise, whether contracts by force of the different statutes of limitations in States are

not exceptions from the general rule of the *lex loci contractus*. There are such exceptions for dissolving and discharging contracts out of the jurisdiction in which they were made. The limitations of remedies, and the forms and modes of suit, make such an exception. Conf. of Laws, 271, and 524 to 527. We may then infer that the doubts expressed in *Leroy v. Crowninshield* would have been withheld if the point had been considered in the connection we have mentioned.

We have found, too, that several of the civilians who wrote upon the question did so without having kept in mind the difference between the positive and negative prescription of the civil law. In doing so, some of them — not regarding the latter in its more extended signification as including all those bars or exceptions of law or of fact which may be opposed to the prosecution of a claim, as well out of the jurisdiction in which a contract was made as in it — were led to the conclusion, that the prescription was a part of the contract, and not the denial of a remedy for its enforcement. It may be as well here to state the difference between the two prescriptions in the civil law. Positive, or the Roman *usucapio*, is the acquisition of property, real or personal, immovable or movable, by the continued possession of the acquirer for such a time as is described by the law to be sufficient. Erskine's Inst. 556. "*Adjectio domini per continuationem possessionis temporis legi definiti.*" Dig. 3.

Negative prescription is the loss or forfeiture of a right by the proprietor's neglecting to exercise or prosecute it during the whole period which the law hath declared to be sufficient to infer the loss of it. It includes the former, and applies also to all those demands which are the subject of personal actions. Erskine's Inst. 560, and 3 Burge, 26.

Most of the civilians, however, did not lose sight of the differences between these prescriptions, and if their reasons for doing so had been taken as a guide, instead of some expressions used by them, in respect to what may be presumed as to the extinction or payment of a claim, while the plea in bar is pending, we do not think that any doubt would have been expressed concerning the correctness of their other conclusion, that statutes of limitation in suits upon contracts only relate to the remedy. But that was not done, and, from some expressions of Pothier and Lord Kames, it was said, "If the statute of limitations does create, *proprio rigore*, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why the presumption of such payment, thus arising from the *lex loci contractus*, should not be as conclusive in every other place as in the place of the contract." And that was said in *Leroy v. Crowninshield*, in opposition to the declaration of both of those writers, that in any other place than that of the contract such a presumption could not be made to defeat a law providing for proceedings upon suits. Here, turning aside for an instant from our main purpose, we find the beginning or source of those constructions of the English statutes of limitation which almost made them useless for the accomplishment of their end.

Within a few years, the abuses of such constructions have been much corrected, and we are now, in the English and American courts, nearer to the legislative intent of such enactments.

But neither Pothier nor Lord Kames meant to be understood, that the theory of statutes of limitation purported to afford positive presumptions of payment and extinction of contracts, according to the laws of the place where they are made. The extract which was made from Pothier shows his meaning is, that, when the statute of limitations has been pleaded by a defendant, the presumption is in his favor that he has extinguished and discharged his contract, until the plaintiff overcomes it by proof that he is within one of those exceptions of the statute which takes it out of the time after which he cannot bring a suit to enforce judicially the obligation of the defendant. The extract from Lord Kames only shows what may be done in Scotland when a process has been brought for payment of an English debt, after the English prescription has taken place. The English statute cannot be pleaded in Scotland in such a case, but, according to the law of that forum, it may be pleaded that the debt is presumed to have been paid. And it makes an issue, in which the plaintiff in the suit may show that such a presumption does not apply to his demand; and that without any regard to the prescription of time in the English statute of limitation. It is upon this presumption of payment that the conclusion in *Leroy v. Crowninshield* was reached, and as it is now universally admitted that it is not a correct theory for the administration of statutes of limitation, we may say it was in fact because that theory was assumed in that case that doubts in it were expressed, contrary to the judgment which was given, in submission to what was admitted to be the law of the case. What we have said may serve a good purpose. It is pertinent to the point raised by the pleading in the case before us, and in our judgment there is no error in the District Court's having sustained the demurrer.

Before concluding, we will remark that nothing has been said in this case at all in conflict with what was said by this court in *Shelby v. Guy*, 11 Wheaton, 361. The distinctions made by us here between statutes giving a right to property from possession for a certain time, and such as only take away remedies for the recovery of property after a certain time has passed, confirm it. In *Shelby v. Guy* this court declared that, as by the laws of Virginia five years' *bona fide* possession of a slave constitutes a good title upon which the possessor may recover in detinue, such a title may be set up by the vendee of such possessor in the courts of Tennessee as a defence to a suit brought by a third party in those courts. The same had been previously ruled in this court in *Brent v. Chapman*, 5 Cranch, 358; and it is the rule in all cases where it is declared by statute that all rights to debts due more than a prescribed term of years shall be deemed extinguished, and that all titles to real and personal property not pressed within the prescribed time shall give ownership to an adverse possessor. Such a law, though

one of limitation, goes directly to the extinguishment of the debt, claim, or right, and is not a bar to the remedy. *Lincoln v. Battelle*, 6 Wend. 475; *Confl. of Laws*, 582.

In *Lincoln v. Battelle*, 6 Wend. 475, the same doctrine was held. It is stated in the *Conflict of Laws*, 582, to be a settled point. The courts of Louisiana act upon it. We could cite other instances in which it has been announced in American courts of the last resort. In the cases of *De la Vega v. Vianna*, 1 Barn. & Adol. 284, and the *British Linen Company v. Drummoud*, 10 Barn. & Cres. 903, it is said that, if a French bill of exchange is sued in England, it must be sued on according to the laws of England, and there the English statute of limitations would form a bar to the demand if the bill had been due for more than six years. In the case of *Don v. Lippman*, 5 Clark & Fin. 1, it was admitted by the very learned counsel who argued that case for the defendants in error, that, though the law for expounding a contract was the law of the place in which it was made, the remedy for enforcing it must be the law of the place in which it is sued. In that case will be found, in the argument of Lord Brougham before the House of Lords, his declaration of the same doctrine, sustained by very cogent reasoning, drawn from what is the actual intent of the parties to a contract when it is made, and from the inconveniences of pursuing a different course. In *Beckford and others v. Wade*, 17 Vesey, 87, Sir William Grant, acknowledging the rule, makes the distinction between statutes merely barring the legal remedy and such as prohibit a suit from being brought after a specified time. It was a case arising under the possessory law of Jamaica, which converts a possession for seven years under a deed, will, or other conveyance, into a positive absolute title, against all the world,—without exceptions in favor of any one or any right, however a party may have been situated during that time, or whatever his previous right of property may have been. There is a statute of the same kind in Rhode Island. 2 R. I. Laws, 363, 364, ed. 1822. In Tennessee there is an act in some respects similar to the possessory law of Jamaica; it gives an indefeasible title in fee simple to lands of which a person has had possession for seven years, excepting only from its operation infants, feme coverts, *non compos mentis*, persons imprisoned or beyond the limits of the United States and the territories thereof, and the heirs of the excepted, provided they bring actions within three years after they have a right to sue. Act of November 16, 1817, ch. 28, §§ 1, 2. So in North Carolina there is a provision in the act of 1715, ch. 17, § 2, with the same exceptions as in the act of Tennessee, the latter being probably copied substantially from the former. Thirty years' possession in Louisiana prescribes land, though possessed without title and *malâ fide*.

We have mentioned those acts in our own States only for the purpose of showing the difference between statutes giving title from possession, and such as only limit the bringing of suits. It not unfrequently happens in legislation that such sections are found in statutes for the

limitation of actions. It is, in fact, because they have been overlooked that the distinction between them has not been recognized as much as it ought to have been, in the discussion of the point whether a certain time assigned by a statute, within which an action must be brought, is a part of the contract, or solely the remedy. The rule in such a case is, that the obligations of the contract upon the parties to it, except in well-known cases, are to be expounded by the *lex loci contractus*. Suits brought to enforce contracts, either in the State where they were made or in the courts of other States, are subject to the remedies of the forum in which the suit is, including that of statutes of limitation.

*Judgment affirmed.*<sup>1</sup>

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### THE HARRISBURG.

SUPREME COURT OF THE UNITED STATES. 1886.

[Reported 119 *United States*, 199.]

This is a suit *in rem* begun in the District Court of the United States for the Eastern District of Pennsylvania, on the 25th of February, 1882, against the steamer "Harrisburg," by the widow and child of Silas E. Rickards, deceased, to recover damages for his death caused by the negligence of the steamer in a collision with the schooner "Marietta Tilton," on the 16th of May, 1877, about one hundred yards from the Cross Rip Light Ship, in a sound of the sea embraced between the coast of Massachusetts and the Islands of Martha's Vineyard and Nantucket, parts of the State of Massachusetts. The steamer was engaged at the time of the collision in the coasting trade, and belonged to the port of Philadelphia, where she was duly enrolled according to the laws of the United States. The deceased was first officer of the schooner, and a resident of Delaware, where his widow and child also resided when the suit was begun.

The statutes of Pennsylvania in force at the time of the collision provided that, "whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life," "the husband, widow, children, or parents of the deceased, and no other relative," "may maintain an action for and recover damages for the death thus occasioned." "The action shall be brought within one year after the death, and not thereafter." Brightly's *Purdon's Dig.* 11th ed., 1267, §§ 3, 4, 5; Act of April 15, 1851, § 18; Act of April 6, 1855, §§ 1, 2.

<sup>1</sup> *Acc. Don v. Lippman*, 5 Cl. & Fin. 1; *Alliance Bank v. Carey*, 5 C. P. D. 429; *Bank of U. S. v. Donnally*, 8 Pet. 361; *Burgett v. Williford*, 56 Ark. 187, 19 S. W. 750; *Atwater v. Townsend*, 4 Conn. 47; *Collins v. Manville*, 170 Ill. 614, 48 N. E. 914; *Labatt v. Smith*, 83 Ky. 599; *Pearsall v. Dwight*, 2 Mass. 84; *Perkins v. Guy*, 55 Miss. 153; *Carson v. Hunter*, 46 Mo. 467; *Warren v. Lynch*, 5 Johns. 239; *Watson v. Brewster*, 1 Barr, 381. — Ed.

By a statute of Massachusetts relating to railroad corporations, it was provided that "if, by reason of the negligence or carelessness of a corporation, or of the unfitness or gross negligence of its servants or agents while engaged in its business, the life of any person, being in the exercise of due diligence, . . . is lost, the corporation shall be punished by a fine not exceeding five thousand nor less than five hundred dollars, to be recovered by indictment and paid to the executor or administrator for the use of the widow and children." . . . "Indictments against corporations for loss of life shall be prosecuted within one year from the injury causing the death." Mass. Gen. Sts. 1860, c. 63, §§ 97-99; Stat. 1874, c. 372, § 163.<sup>1</sup>

WARTE, C. J. We are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with a right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown. As to this, it only appears that the wrong was done in May, 1877, and that the suit was not brought until February, 1882, while the law required it to be brought within a year.

*The decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the libel.*<sup>2</sup>

<sup>1</sup> Only so much of the case as involves the question of limitation of time is given. Arguments of counsel are omitted. — Ed.

<sup>2</sup> See *Brunswick Terminal Co. v. Bank*, 99 Fed. 635. — Ed.

SEA GROVE BUILDING AND LOAN ASSOCIATION v.  
STOCKTON.

SUPREME COURT OF PENNSYLVANIA. 1892.

[Reported 148 Pennsylvania, 146.]

PROCEEDING upon a bond secured by a mortgage of real estate in New Jersey.

Judgment having been entered upon the bond, was opened by the court, and by agreement of counsel the case was considered as though a *sci. fa.* had been issued and proper pleas pleaded by defendant.

Defendant's points were as follows :—

“(1) The act of assembly of the State of New Jersey approved March 23, 1881, amendatory of the act of March 12, 1880, is a bar to any recovery by the plaintiff in this action, and the verdict must be for the defendant.

“(2) Under all the evidence in the cause, the verdict must be for the defendant.”

The court directed a verdict for the plaintiff, reserving the above points. Subsequently HEMPHILL, J., entered judgment for defendant, delivering the following opinion :—

The plaintiff's claim in this case is upon a judgment entered in this court for a balance alleged to be due upon a bond that accompanied a mortgage, both of which were executed in the State of New Jersey, and given for the same debt; and the question for our determination is raised by the following point, presented by the defendant on the trial of the cause, and reserved by the court, viz. : that “The act of assembly of the State of New Jersey approved March 23, 1881, amendatory of the act of March 12, 1880, is a bar to any recovery by the plaintiff in the action, and the verdict must be for the defendant.”

The first section of said act of March 23, 1881, is as follows : “That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, and if, at the sale of the mortgaged premises, under said foreclosure proceedings, the said premises should not sell for a sum sufficient to satisfy said debt, interest, and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within six months from the date of the sale of said mortgaged premises, and judgment shall be rendered and execution issue only for the balance of the debt and costs of suit.”

The foregoing section amended sect. 2 of the act of 1880 in manner following : The words, “it shall be lawful to proceed,” used in the act of 1880, are stricken out, and in their place are inserted the words, “all proceedings to collect said debt shall be, first, to foreclose,” etc.



Whether the language quoted from the act of 1880 was merely declaratory of the then existing law, or gave the creditor an option that he did not previously have, we are unable to say, but it is clear that that option has been taken away by the act of 1881, for its language is mandatory, — “all proceedings, etc., shall be, first, to foreclose the mortgage,” etc.

The second section of said act of 1881 reads as follows: “That if, after the foreclosure and sale of any mortgaged premises, the person who is entitled to the debt shall recover a judgment in a suit on said bond for any balance of debt, such recovery shall open the foreclosure and sale of said premises, and the person against whom the judgment has been recovered may redeem the property by paying the full amount of money for which the decree was rendered, with interest, to be computed from the date of said decree, and all costs of proceedings on the bond: provided, that a suit for redemption is brought within six months after the entry of such judgment for the balance of the debt.”

This section amended the third section of the act of 1880 by striking out the words, “the owner of the property at the time of said foreclosure and sale,” and inserting, in lieu thereof, “the person against whom the judgment has been recovered,” thus securing to the judgment debtor, and depriving the owner of the premises, unless he be also the judgment debtor, the right of redemption.

From the foregoing it will be seen that, under the law of New Jersey, to collect a debt secured by bond and mortgage, a creditor is compelled, first, to foreclose the mortgage and sell the mortgaged premises, and, then, if there be any deficiency, he may sue upon the bond, provided his suit be commenced within six months from date of sale of the mortgaged premises, and if he recover judgment in such suit for the balance of the debt, the judgment creditor may redeem the property, provided his suit for redemption is brought within six months after the entry of the judgment for the balance of the debt.

The facts of the case under consideration are, briefly, as follows: The defendant, on Feb. 19, 1883, gave to the plaintiff a bond and mortgage for \$600, secured by lien upon certain real estate owned by him in the State of New Jersey, and at the same time, as collateral security, transferred to the plaintiff his stock in the plaintiff association. On Feb. 9, 1884, the defendant conveyed the mortgaged premises, subject to the mortgage, to Ellwood Parsons, to whom he also, at the same time, transferred, on the books of the plaintiff association, his stock in said association. On Oct. 6, 1885, Ellwood Parsons and wife conveyed the same premises, subject to said mortgage, to Martha McIlvaine, and she, on April 23, 1886, conveyed it to Levi Haas. A bill to foreclose said mortgage was filed Aug. 26, 1887, and final decree made July 22, 1889. On Sept. 14, 1889, the sheriff sold the mortgaged premises under the foreclosure proceedings, and sold at the same time the stock in the plaintiff association, pledged by defendant as collateral security, and the plaintiff purchased both premises and stock. This sale was

confirmed on Sept. 25, 1889, and on Jan. 1, 1890, plaintiff sold said premises. On April 14, 1890, the plaintiff entered judgment upon the bond accompanying said mortgage, in the Court of Common Pleas of Chester County, Pennsylvania, and on the same day issued a writ of *fieri facias* upon the same. On April 21, 1890, on motion of defendant, a rule was granted upon the plaintiff to show cause why the judgment should not be opened, and he let into a defence, which rule was, on July 14, 1890, made absolute. On Aug. 18, 1890, by agreement of counsel, the case was considered at issue with the same effect as though a writ of *scire facias* had issued, and the proper pleas been pleaded. No proceedings were ever had on the bond in the State of New Jersey.

These facts raise the question whether, under the above cited acts of assembly of New Jersey, the plaintiff can recover in the suit brought upon said bond in this county; and the answer to this question must depend upon whether the acts referred to are acts of limitation, or are incidents of the contract and affect the rights of the parties. If the former, the *lex fori* must govern; if the latter, the *lex loci contractus*.

Statutes of limitation, it is well settled, form no part of the contract itself; they affect only the remedy in case of suit. A statute of limitation has been defined to be "a statute assigning a certain time, after which rights cannot be enforced by action," and Green, J., in *Tenant v. Tenant*, 110 Pa. 485, has thus described its effect or operation: "The State simply declares that, if her process is used, it must be done within certain fixed periods of time, and if not so used, the defendant may, at his option, plead the laches of the plaintiff, and receive the benefit of the prohibition. It is, in substance, a prohibition on the use of process, after a definite period, and this, of course, makes it a matter of remedy only," for "the obligation of the contract is not terminated or defeated."

Now, the act of 1881 does limit the mortgagee's right of action upon his bond to "six months from the date of the sale of said mortgaged premises;" it also limits the judgment debtor's right to sue for redemption to "six months after the entry of such judgment for the balance of the debt."

Both of these provisions have all the essentials of a statute of limitation, and if the act contained either or both, and nothing more, we could have no hesitation in pronouncing it a statute of limitations, and affecting, consequently, the remedy only.

We must, however, consider and interpret the act as a whole, and endeavor to ascertain its intent or object, and, in this enlarged view, it is apparent that its object is not merely to limit the time within which either suit upon the bond or for redemption may be brought (they are but incidents), but to prescribe, and in a mandatory manner, how debts secured by bond and mortgage shall be collected; and it is well settled that, when a particular mode of procedure is prescribed, all others are denied or excluded. It is equally well settled, that all contracts are

presumed to have been made with reference to existing laws, which, where applicable, form a part of the contract itself.

This mortgage contract was, therefore, made under and with reference to the existing laws of New Jersey, which were an incident of the contract and an implied part of the agreement of the parties, and, in compliance with the requirements of these laws, the mortgagee, in case of default, was bound to proceed, first, to foreclose the mortgage, and had he, in violation of his implied agreement, sued first upon his bond, either in New Jersey or Pennsylvania, the statute of 1881 would have been a full and complete defence, and prevented recovery, not because it contained limitations of certain actions, but because it was in violation of the contract, viz.: that the mortgagee should proceed, first, to foreclose the mortgage, and if he subsequently proceeded on the bond, to collect any deficiency, that the judgment debtor should have six months, from entry of judgment for such deficiency, within which to bring his suit for redemption, of which he would otherwise be deprived, thus affecting not merely the remedy, but the rights of the parties. The act of 1881 is not an act of limitation, but an act prescribing and regulating the mode of procedure on all mortgage contracts entered in the State of New Jersey. It not only compels the mortgagee to first foreclose the mortgage, and, if he desires to proceed on the bond for any deficiency, to commence his suit within six months from the date of the sale of the mortgaged premises, but it also, in case judgment be recovered on the bond, opens the foreclosure and sale of the premises, and allows the judgment creditor six months, from the entry of such judgment, within which to bring his suit for redemption.

While the act does not say the debt is extinguished, unless the mortgagee bring the suit on the bond within the time specified, yet such is clearly the implied and logical conclusion; for, if not extinguished, and suit could be afterwards brought, the foreclosure and sale would not be opened; the judgment creditor would be deprived of his right of redemption, and the six months' limitation would be without meaning and useless.

It is furthermore apparent, from the title of the act itself, that it is not one of limitations, for it declares it to be "An act concerning proceedings on bonds and mortgages given for the same indebtedness, and the foreclosure of the mortgaged premises thereunder."

We are, therefore, of the opinion that the act of assembly of New Jersey, of March 28, 1881, was an incident of the contract, affecting not merely the remedy under, but the rights of the parties to, the contract, and that, by the failure of the plaintiff to proceed on his bond within six months from the date of the sale of the mortgaged premises, the debt is extinguished, and he cannot recover in this action. The defendant's points are affirmed, and judgment must be entered for the defendant *non obstante verdicto*, upon payment of the verdict fee.

*Judgment for defendant, non obstante verdicto. Plaintiff appealed.*

PER CURIAM. This case has been so well discussed by the learned judge of the court below, that we affirm the judgment, for the reasons given by him.

## HAMIDA v. BENAÏAD.

CIVIL TRIBUNAL OF THE SEINE. 1885.

[Reported 13 *Clunet*, 203.]

THE TRIBUNAL. This action having for its object the dissolution of a partnership and the distribution of the assets, the prescription which applies is the *prescription libératoire*, which according to the law of France runs only in thirty years (by the terms of Art. 2262 of the Civil Code) when it is invoked in a mixed action like this. Admitting that the *prescription libératoire* is governed by the law of the debtor's domicile, at the time of bringing the action, in this case the prescription of Art. 2262 began to run for the benefit of Mahmoud Benaïad only from the time when he became French by naturalization, Sept. 13, 1852; the prescription was interrupted by this action, brought Oct. 21, 1880. In the interval less than thirty years elapsed, and the time required by the French law has not run.

The defendants, to succeed in their plea, must prove that before Mahmoud's naturalization, the prescription had already begun to run for his benefit by virtue of the law of his country. It is for him that alleges this to prove it, questions of foreign law being, for French courts, questions of fact; and in this respect they do not prove their plea.

The starting of the prescription at a date prior to Sept. 13, 1852, not being proved, prescription cannot be allowed.<sup>1</sup>

<sup>1</sup> Five rules have been suggested by foreign jurists as governing the application of the laws of prescription. 1. That prescription is governed by the law of the place where the obligation came into existence. *Cauhapéron v. Compagnies des Chemins de fer* (Bordeaux, 27 Apr. 1891), 19 *Clunet*, 1004; *Harvey v. Engelbert* (Bremen, 5 Mar. 1877), 5 *Clunet*, 627; *Blankezteju v. Prokuratorza* (Senate of Warsaw, 6 Dec. 1873), 1 *Clunet*, 333. 2. That it is governed by the law of the debtor's domicile, *Merlin Rep. Preser. Sec. 1, § 3, VII*; *Noto v. Pacini* (Seine, 11 Dec. 1893), 21 *Clunet*, 145; *Anon.* (Holland, 1874), 1 *Clunet*, 141. 3. That it is governed by the law of the creditor's domicile. 4. That it is governed by the law of the place of performance of the obligation. These rules do not seem to be generally held by any court. 5. That it is governed by the law of the forum. *Wehrle v. Letwinoff* (Seine, 28 Nov. 1891), 19 *Clunet*, 712; *X. v. de Jellinck* (Brussels, 4 Feb. 1893), 20 *Clunet*, 942. — Ed.

HOADLEY *v.* NORTHERN TRANSPORTATION CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1874.

[*Reported 115 Massachusetts, 304.*]

COLT, J.<sup>1</sup> The plaintiff seeks to recover in tort against the defendant as a common carrier for the loss of a steam-engine which it had undertaken to transport from Chicago, Illinois, and deliver to him at Lawrence in this State. The engine was destroyed at Chicago in the great fire of 1871, and one question at the trial was, whether by the terms of the contract of transportation the defendant was liable for this loss.

The plaintiff put in the bill of lading received by his agent at Chicago of the defendant at the time the property was delivered for transportation. It is in the usual form, and the terms and conditions are expressed in the body of the paper in a way not calculated to escape attention. In one clause it exempts the defendant from all liability for loss or damage by fire; in another from all liability "for loss or damage on any article or property whatever by fire while in transit or while in depots or warehouses or places of transshipment," and further provides that the delivery of the bill of lading shall be conclusive evidence of assent to its terms.

It was assumed by both parties as now settled that a common carrier may by special contract avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire occurring without his own fault. Such is the declared law of this Commonwealth, and the Illinois cases produced at the trial assume that the same rule prevails there. An express contract, once established, is in both States effectual to limit the carrier's liability. But the plaintiff contended that by the law of Illinois, as declared in the courts of that State, the mere receipt, without objection, of a bill of lading which limits the carrier's common law liability for loss by fire, would not raise a presumption that its terms were assented to, but such assent, if relied on, must be shown by other and additional evidence. The jury have found this to be the law of that State, under instructions not objected to, and we are not required to say whether there was sufficient evidence to warrant the finding. *Adams Express Company v. Haynes*, 42 Ill. 89; *American Express Company v. Schier*, 55 Ill. 140, 150; *Illinois Central Railroad v. Frankenberg*, 54 Ill. 88, 98. The court ruled that this law of Illinois must govern the case, and that under it the jury could not find that the mere receipt of the bill of lading would be evidence of assent to its terms.

The law of this Commonwealth differs from the law of Illinois as thus found. In *Grace v. Adams*, 100 Mass. 505, decided by this court on an agreed statement of facts, it was held that a bill of lading or shipping receipt, taken by a consignor without dissent at the time of the delivery of the property for transportation, by the terms of which the carrier stipulates against such liability, would exempt the carrier when

<sup>1</sup> Part of the opinion only is given. — Ed.

the loss was not caused by his own negligence, on the ground that such acceptance would authorize him to infer assent, and amount to evidence of the contract between the parties. The defendant contends that the case is to be tried by the law of this Commonwealth.

It is a general rule that personal contracts must have the same interpretation and binding force in all countries which they have in the place where made. The contract is presumed to have been entered into with reference to the law of that place. If formalities and solemnities are there required to give validity to it, the requirement must be shown to have been observed. But the law of the place where the action is brought, by the same general rule, regulates the remedy and all the incidents of the remedy upon it. The law of the former place determines the right; the law of the latter controls the admission of evidence and prescribes the modes of proof by which the terms of the contract are made known to the court, as well as the form of the action by which it is enforced. Thus in a suit in Connecticut against the indorser on a note made and indorsed in New York, it was held that parol evidence of a special agreement different from that implied by law would be received in defence, although by the law of the latter State no agreement different from that which the law implies from a blank indorsement could be proved by parol. *Downer v. Chesebrough*, 36 Conn. 39. And upon the same principle it has been held that a contract valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails unless it is put in writing as required. *Leroux v. Brown*, 12 C. B. 801. So *assumpsit* was held to lie in New York on an undertaking in Wisconsin contained in a writing having a scrawl and no seal affixed to the defendant's name, although in the latter State it had in pleadings and in evidence the effect of a seal. *Le Roy v. Beard*, 8 How. 451. The statute of limitations for the same reasons affects only the remedy, and has no extra-territorial force.

It is not always indeed easy to determine whether the rule of law sought to be applied touches the validity of the contract or only the remedy upon it. In the opinion of the court, the rule of law laid down in Illinois and here relied on by the plaintiff affects the remedy only, and ought not to control the courts of this Commonwealth. The nature and validity of the special contract set up is the same in both States. It is only a difference in the mode of proof. A presumption of fact in one State is held legally sufficient to prove assent to the special contract relied on to support the defence. In the other State it is held not to be sufficient. It is as if proof of the contract depended upon the testimony of a witness competent in one place and incompetent in the other. The instructions given at the trial upon this point did not conform to the view of the law above stated, in which, upon more full consideration, we all concur.

*Exceptions sustained.*<sup>1</sup>

<sup>1</sup> *Acc.* *Johnson v. C. & N. W. Ry.*, 91 Ia. 248, 59 N. W. 66. *Contra*, *Teuconi v. Terzaghi* (Turin Cass. 7 July, 1887), 15 Clunet, 426. LORD BROUGHAM in *Bain v.*

## PECK v. MAYO.

SUPREME COURT, VERMONT. 1842.

[Reported 14 Vermont, 33.]

REDFIELD, J.<sup>1</sup> This action is upon a promissory note, made in Montreal, where the legal rate of interest is six per cent, payable at the M. & F.'s bank, in the city of Albany, where the legal rate of interest is seven per cent, and indorsed by the defendants in this State, where the legal rate of interest is six per cent. This action being against the defendants, as indorsers, the only question is, what rate of interest are they liable for? The note was payable at a day certain, but no interest stipulated in the contract. The interest claimed is for damages in not paying the money when due.

The first question naturally arising in this case is, what rate of interest, by way of damages, are the signers liable for? There are fewer decisions to be found in the books, bearing directly upon this subject, than one would naturally have expected. It is an elementary principle, upon this subject, that all the incidents pertaining to the validity and construction, and especially to the discharge, performance, or satisfaction of contracts, and the rule of damages for a failure to perform such contract, will be governed by the *lex loci contractus*. This term, as is well remarked by Mr. Justice Story, in his Conflict of Laws, 248, may have a double meaning or aspect; and that it may indifferently indicate the place where the contract is actually made, or that where it is virtually made, according to the intent of the parties, that is, the place of performance. The general rule now is, I apprehend, that the latter is the governing law of the contract. Hence the elementary principle undoubtedly is that the rate of interest, whether stipulated in the contract or given by way of damages for the non-performance, is the interest of the place of payment.

We will next examine whether any positive rule of law has been established contravening this principle. 2 Kent Com. 460, 461. Chancellor Kent expressly declares that this elementary principle is now the "received doctrine at Westminster Hall," and cites *Thompson v.*

*Whitehaven, &c. Ry.*, 3 H. L. C. 1, 19, said: "The law of evidence is the *lex fori* which governs the courts. Whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not: This is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it."

So if a stamp is required for admitting any document in evidence, even a foreign document must be stamped before it will be admitted; while a document valid but inadmissible, under this rule, where made, may be admitted in another State not requiring a stamp. *Bristow v. Sequeville*, 5 Ex. 275; *Fant v. Miller*, 17 Grat. 47; *Murdock v. Roebuck*, 1 Juta (Cape Colony), 1; *Dearsley v. Rennels* (Ghent, 7 Dec. 1876), 5 Clunet, 509. — Ed.

<sup>1</sup> Part of the opinion only is given. — Ed.

Powles, 2 Simons' R. 194 (2 Cond. Ch. R. 378). This case does not necessarily decide this point, but the opinion of the Vice Chancellor expressly recognizes the rule, that, although the rate of interest stipulated is above the English interest, still the contract will not be usurious, unless it appear to be a contract made in England and there to be performed. The case of *Harvey v. Archbold*, 1 Ryan & Moody, 184 (21 Eng. C. L. 729), recognizes more expressly the same doctrine. The case of *Depau v. Humphreys*, 8 Martin, 1, expressly decides, that a contract made in one country, to be performed in another, where the rate of interest is higher than at the place of entering into the contract, it may stipulate the higher rate of interest. Mr. Justice Story recognizes the elementary rule, above alluded to, as the settled law. Conflict of Laws, 243, 246. Similar language is adopted by Mr. Justice Thompson, *Boyce v. Edwards*, 4 Peters' R. 111, and by Mr. Chief Justice Taney, in *Andrews v. Pond*, 13 Peters, 65, and by Chancellor Walworth, in *Hosford v. Nichols*, 1 Paige, 220. Much the same is said by the court in the case of the *Bank of the U. S. v. Daniel*, 12 Peters, 32. In many of these cases the question alluded to was not directly before the court, but, by all these eminent jurists, it seems to have been considered as one of the long settled principles of the law of contract. The same rule of damages was, in the case of *Ekins v. the East India Company*, 1 P. Wms. 395, applied to the tortious conversion of a ship in Calcutta, the court making the company liable for the value of the ship, at the time of conversion, and the India rate of interest for the delay of the payment of the money. In this case the interest allowed was greater than the English interest.

When the contract is entered into in one country, to be performed in another, having established a lower rate of interest than the former, and the contract stipulates interest generally, it has always been held that the rate of interest recoverable was that of the place of performance only. It is expressly so decided in *Robinson v. Bland*, 2 Burrow, 1077; *Fanning v. Consequa*, 17 Johns. 511; *Schofield v. Day*, 20 Johns. R. 102.

From all which I consider the following rules, in regard to interest on contracts, made in one country to be executed in another, to be well settled: 1. If a contract be entered into in one place to be performed in another, and the rate of interest differ in the two countries, the parties may stipulate for the rate of interest of either country, and thus by their own express contract, determine with reference to the law of which country that incident of the contract shall be decided. 2. If the contract, so entered into, stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear the parties intended to contract with reference to the law of the other place. 3. If the contract be so entered into, for money, payable at a place on a day certain, and no interest be stipulated, and payment be delayed, interest, by way of damages, shall be allowed according to the law of the place of payment, where the money may be supposed to have been



required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occurring, and to have paid the rate of interest of that country. This is expressly recognized as the settled rule of law, in regard to the acceptor of a bill, who stands in the place of the maker of these notes. 3 Kent's Com. 116.<sup>1</sup>

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AYER v. TILDEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1860.

[Reported 15 Gray, 178.]

ACTION of contract upon this promissory note, made and indorsed by the defendants: "\$670.81. New Lebanon, 20th June, 1857. Six months after date we promise to pay to the order of ourselves six hundred and seventy dollars and eighty-one cents, value received, at Bank of America, N. Y. Tilden & Co."

The parties stated the following case, upon which the Superior Court in Middlesex gave judgment for the defendants, and the plaintiffs appealed.<sup>2</sup>

HOAR, J. The plaintiffs are entitled to recover, according to the agreement of parties, the principal of the note, with interest at such a rate as the law will allow. That rate will be six per cent from the maturity of the note. The interest is not a sum due by the contract, for by the contract no interest was payable, and is not therefore affected by the law of the place of contract. It is given as damages for the breach of contract, and must follow the rule in force within the jurisdiction where the judgment is recovered. *Grimshaw v. Bender*, 6 Mass. 157; *Eaton v. Mellus*, 7 Gray, 566; *Barringer v. King*, 5 Gray, 12. The contrary rule has been held to be applicable where there was an express or implied agreement to pay interest. *Winthrop v. Carleton*, 12 Mass. 4; *Von Hemert v. Porter*, 11 Met. 220; *Lanusse v. Barker*, 3 Wheat. 147.

Perhaps it would be difficult to support the decision in *Winthrop v. Carleton* upon any sound principle; because the court in that case held that interest could only be computed from the date of the writ, thus clearly showing that it was not considered as due by the contract, and yet adopted the rate of interest allowed at the place of the contract. But the error would seem to be in not treating money, paid at the implied request of another, as entitled to draw interest from the time of payment.

<sup>1</sup> *Acc. Gibbs v. Fremont*, 9 Ex. 25; *Ex parte Heidelberg*, 2 Low. 526; *Ballister v. Hamilton*, 3 La. Ann. 401; *Fanning v. Consequa*, 17 Johns. 511; *Raymond v. Messier* (French Cass. 9 June, 1850), 7 Clunet, 394.—Ed.

<sup>2</sup> Only so much of the case as deals with the rate of interest is given. — Ed.

An objection to adopting the rule of the rate of interest in the jurisdiction where the action is brought as the measure of damages may be worthy of notice, that this rule would allow the creditor to wait until he could find his debtor or his property within a jurisdiction where a much higher rate of interest was allowed than at the place of the contract. But a debtor could always avoid this danger by performing his contract; and the same difficulty exists in relation to the actions of trover and replevin.

If such a case should arise, it might with more reason be argued that the damages should not be allowed to exceed those which would have been recovered in the State where the contract was made and to be performed.<sup>1</sup>

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### COMMERCIAL NATIONAL BANK *v.* DAVIDSON.

SUPREME COURT OF OREGON. 1889.

[*Reported 18 Oregon, 57.*]

THAYER, C. J.<sup>2</sup> . . . It is stipulated in the note to the effect that if it is not paid at maturity the makers will pay ten per cent additional as costs of collection. . . . It is my opinion that a clause in a promissory note, in the form of the stipulation in question, is not valid, and should not be enforced. . . .

Counsel for the respondent insists that the stipulation to pay the additional sum contained in the note in suit was valid and binding in the Territory where the note was executed, and that therefore it should be upheld in this State. As a general rule, the law of the place where contracts merely personal are made, governs as to their nature, obligation, and construction. But I do not think that rule applies to an agreement, the obligation of which does not arise until a remedy is sought upon the contract, to which it is only auxiliary. In regard to such agreements, the law of the place where they are attempted to be

<sup>1</sup> See *Kopelke v. Kopelke*, 112 Ind. 435.

In *Meyer v. Estes*, 164 Mass. 457, 465, FIELD, C. J., said: "In determining the measure of damages the first question is whether the contract is to be governed by the law of Massachusetts or by the law of the kingdom of Saxony. We think that it is to be governed by the law of Massachusetts. The contract was signed in Massachusetts and sent to the plaintiff at Leipzig, Saxony; it did not become a contract until the plaintiff accepted it and notified the defendants of such acceptance, which he did by telegram sent to them at Boston. *Lewis v. Browning*, 130 Mass. 173; *Pine v. Smith*, 11 Gray, 38; *Hill v. Chase*, 143 Mass. 129. The contract relates to what is to be done by the defendants in the United States of America; the defendants are described as 'of Boston, Mass., U. S. A.,' and the date of the contract is Boston. We think that it must be regarded as a contract to be performed in Massachusetts, and that the law of Massachusetts, which is also the law of the forum, must determine the damages to be recovered in the action." — Ed.

<sup>2</sup> Only so much of the opinion as deals with the question of costs is given. — Ed.

enforced, I should suppose, would prevail. This agreement was to pay the additional percentage as costs for collection of the note, and if the courts where the note was executed would have enforced the agreement, it does not follow that the courts of another jurisdiction are bound to do so. The effect of the agreement was to provide for an increase of costs, which are only incidental to the judgment, and the allowance of which must necessarily depend upon the law of the forum. A stipulation in a note made in Utah Territory, providing that in an action on the note the plaintiff, in case of a recovery, should be entitled to double costs, might be considered valid under the laws of that Territory, and enforceable in its courts; but that certainly would not render it incumbent upon the courts of this State, in an action upon such note, to award double costs.<sup>1</sup>

<sup>1</sup> *Acc. Security Co. v. Eyer*, 36 Neb. 507, 54 N. W. 838. — ED.



A  
SELECTION OF CASES  
ON  
THE CONFLICT OF LAWS

BY  
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## CHAPTER X.

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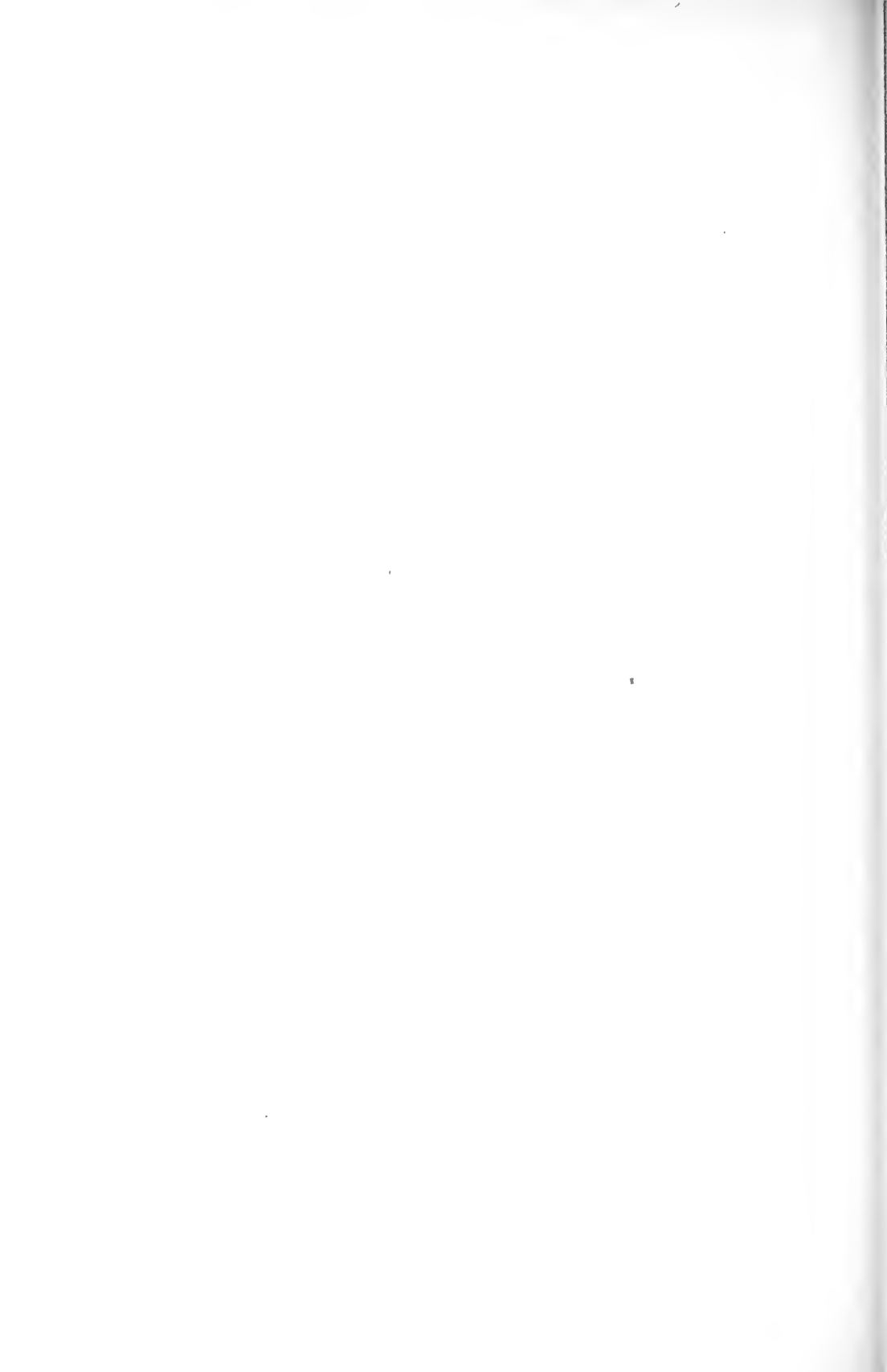
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# CASES ON THE CONFLICT OF LAWS.

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## PART III.

### THE CREATION OF RIGHTS.

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#### CHAPTER VI.

#### PERSONAL RIGHTS.

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#### SECTION I.

#### GENERAL PRINCIPLES.

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STORY ON THE CONFLICT OF LAWS (1834), §§ 18, 20, 21, 22, 23, 26, 35. — Every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every State affect, and bind directly, all property, whether real or personal, within its territory: and all persons who are resident within it, whether natural born subjects or aliens; and also all contracts made, and acts done within it. A State may, therefore, regulate the manner and circumstances under which property, whether real or personal or in action, within it shall be held, transmitted, bequeathed, or transferred, or enforced; the condition, capacity, and state of all persons within it; the validity of contracts, and other acts, done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies, and modes of administering justice in all cases calling for the interposition of its tribunals to protect, vindicate, and secure the wholesome agency of its own laws within its own domains.

No State or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects or others. This is a natural consequence of the first proposition; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation that other nations should be at liberty to regulate either persons or things within its territories. It would be equivalent to a declaration that the sov-

ereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules, which none were bound to obey.

Although the laws of a nation have no direct binding force or effect, except upon persons within its territories, yet every nation has a right to bind its own subjects by its own laws in every other place. In one sense, this exception may be admitted to be correct, and well founded in the practice of nations; in another sense it is incorrect, or, at least, it requires qualification.

No nation is bound to respect the laws of another nation, made in regard to subjects who are non-residents. The obligatory force of such laws cannot extend beyond its own territories. And if such laws are incompatible with the laws of the country where they reside, or interfere with the duties which they owe to the country where they reside, they will be disregarded by the latter. Whatever may be the obligatory force of such laws upon such persons, if they should return to their native country, they can have none in other nations where they reside. They may give rise to personal relations between the sovereign and subjects, to be enforced in his own domains; but they do not rightfully extend to other nations. *Claudentur territorio*. Nor, indeed, is there, strictly speaking, any difference in this respect whether such laws concern the persons or the property of native subjects. A State has just as much intrinsic right, and no more, to give to its own laws an extraterritorial force, as to the property of its subjects situated abroad, as it has in relation to the persons of its subjects domiciled abroad. That is, as sovereign laws, they have no obligation or power over either. When, therefore, we speak of the right of a State to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them, and not of its right to compel or require obedience to such laws on the part of other nations. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory according to its own sovereign will and polity.

From these two maxims or propositions there flows a third, and that is, that whatever force and obligation the laws of one country have in another, depends solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.

The jurists of continental Europe have with uncommon skill and acuteness endeavored to collect principles which ought to regulate this subject among all nations. But it is very questionable whether their success has been at all proportionate to their labor, and whether their principles, if universally adopted, would be found either convenient or desirable under all circumstances.

The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which

arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice in order that justice may be done to us in return.

DICEY ON THE THE CONFLICT OF LAWS (1896), p 25. — The object for which courts exist is to give redress for the infringement of rights. No court intends to confer upon a plaintiff new rights, except in so far as new rights may be necessary to compensate for, or possibly to guard against, the infringement of an existing right. The basis of a plaintiff's claim is that, at the moment of his coming into court, he possesses some right, *e. g.*, a right to the payment of £20, which has been violated; the bringing of an action implies, in short, the existence of a right of action. When, therefore, A applies to an English court to enforce a right acquired in France, he must in general show that, at the moment of bringing his action, he possesses a right which is actually acquired under French law, and which he could enforce against the defendant if he sued the defendant in a French court. A complains, for example, of the non-payment of a debt contracted by X in Paris, or seeks damages for an assault committed on him by X in Paris. To bring himself within the principle we are considering, he must show that his right to payment or to damages is actually acquired. He must show that the debt is due under French law, or that the assault is an offence punishable by French tribunals. English law does not, speaking generally, apply to transactions occurring out of England; hence the foundation of A's claim is that he wishes to enforce rights actually obtained in France, and he will, as a rule, fail to make out his case unless he can show that the grievance of which he complains is recognized as such by French law, or, in other words, unless he can show a right to redress recognized by the law of France.

Whether such a right actually exists, *i. e.*, whether A has an "acquired right," is a matter of fact depending upon the law of France and upon the circumstances of the case.

PILLET, "Essai d'un système général de solution des conflits des lois" (1894), 21 *Clunet*, 417, 711. — Whenever the question is raised as to the international nature of a law, one of two answers must be given; the law may be either territorial or extraterritorial. It may be territorial, and then every one in the country is submitted to its jurisdiction without distinction between natives and foreigners domiciled or not domiciled, but, upon the other hand, on leaving the country, each ceases to owe it obedience; or it may be extraterritorial, and the contrary effect produced; where upon once being applied to a person (by virtue of his nationality or his domicile, opinions differ) the law follows him everywhere. . . .

Law should combine, and always does combine, certain characteristics

which are indispensable to its effect, qualities without which it would have no reason for existence. . . . We shall notice here but two, the only important qualities from an international point of view, but of the utmost importance: continuity and generality of application. When we say that law is by its nature continuous, we mean that its authority should be uninterrupted; from the day of its promulgation to the day of its repeal the law must always be heard and obeyed. . . . It is just as necessary that every law should be general in application to its subjects. . . . Order is necessary to every State, and order exists in the domain of law only in so far as the law is applied without distinction to every person within the limits of the State. . . .

From an international point of view, continuity necessarily implies extraterritoriality, generality of application, territoriality. . . . For a law to be truly continuous, it must apply under all circumstances to the person subject to it, it must follow him abroad when he leaves his country, and it must rule all his affairs there as well as in his own country. . . . To take the common example of a law of capacity: suppose it ceases to apply to a person when he leaves his own country, or that it only remains inapplicable to such of the person's property as is situated in a foreign country, and it will be clear that the law misses its object because it misses continuity of effect. . . . One can see that if, in the case of the same person, a period of complete incapacity is followed by a period of limited capacity, all the results that the legislator might attain by the rules he established will be forever compromised by the breach of continuity which will be produced in the application of the rule. In the same way generality is inseparable from territoriality. . . . That order which it is the object of the law to establish would not exist, unless all matters within the control of the society which is ruled by the law were equally subject to its provisions. . . .

Now let us see what would happen if each State in administering justice should carry the consequences of this situation to its logical conclusion. . . . No State would then suffer the application of any foreign law in its territory. Trusting in the generality of its own law, and the territoriality which logically flows from it, the State would assert its authority in all foreign interests which asked aid of its justice. But on the other hand, by a deduction drawn from the character of continuity and extraterritoriality, equally belonging to it, it would apply its own law also to the interests of its own subjects in foreign lands. One must conclude that the harmony which should exist between the laws of various countries can be obtained only through a sacrifice. . . .

The solution of this question cannot depend in every case on the will or the fancy of the one who, as jurisconsult, or as judge, has it to solve. In other words, the territoriality or the extraterritoriality of laws cannot be abandoned to arbitrary will, or as we say, in terms at once fitter and more classic, to the comity of nations. . . . We



must discover some law of harmony, choose indifferently or for simple reasons of equity, either the territoriality of laws or their extraterritoriality; find the principle of harmony which will destroy as little as possible the useful effect of the law, or in other words leave intact as great part as possible of the authority of law. . . . Let us suppose a conflict on the age of majority, in our country twenty-one years, but by the foreign personal law of the party twenty-five years. The French judge has before him two solutions, two means of putting an end to conflict and establishing harmony: to apply the local law by virtue of its territoriality, or the personal law of the foreigner by virtue of its extraterritoriality. Each of the solutions has its advantages and disadvantages. The first is more favorable to the public order and credit; if it is adopted, every one within the territory will be of age at twenty-one years, and one will never have to suspect hidden facts which may lead to the application of a foreign law. On the other hand, it will have the disadvantage that the foreigner in question will suddenly come of age upon crossing the boundary of the country. The other solution would have neither this disadvantage nor the corresponding advantage. Can one suppose that a judge, if not bound by any provision of positive law, could hesitate between the two? The experience of the past answers the question clearly. Hesitation is impossible, because, of the two solutions, the first in return for a slight advantage involves a disadvantage which almost totally destroys the utility of such a law. What is the use of prolonging minority until a given age, if the minor may by a journey free himself from the incapacity? Such a solution reduces almost to naught the authority of the law on this point, whilst the other solution maintains the chief and essential features of its authority, and sacrifices only a territorial effect of little importance in this connection. . . . The great school of "statutaries" thought that the international effect of laws should depend on their object; meaning by this ambiguous word, object, the person or thing which is directly and immediately affected by the law. We thus reach the essential distinction between the two classes, — real laws which were territorial, and personal laws recognized as extraterritorial, — so completely that the two expressions were synonymous. . . . The extraterritorial application of laws relative to the person did not cease to cause them doubt and even remorse. They accepted it, but usually in spite of themselves; as is sufficiently proved by the eagerness with which they recurred to territoriality whenever on the slightest pretext they deemed themselves authorized to do so. In fine, the distinction made by this school, even supposing it applicable to the facts (which the invention of "statutes mixed" shows to be doubtful) had no principle behind it; this error was its greatest, but it was irremediable. . . .

One cannot deny that the essential feature of law is its social object. If, in fact, one analyzes the idea of law in any one of its applications, one necessarily reaches this first conclusion, that law is always the means

employed by the legislator to reach a determined social object. . . . The object of a law is not the immediate effect it has in view : that is the very content of the law, the means employed by the legislator to reach the object, not the object itself. . . . The social object to be attained is the *raison d'être* of the law, gives it its distinctive characteristics, assigns it its period ; is it not logical, therefore, to conjecture that its international effect should be measured by its social object ? Such is in fact the rule we propose. We know that laws are by nature at once territorial and extraterritorial, that they may in international relations preserve but one of these characters : we think that in each case the choice of character should be determined by considering the social object of the law. We shall declare territorial all laws the object of which could not be attained if in each country they did not apply as well to foreigners as to citizens ; extraterritorial all laws the object of which requires that they should follow everywhere the person who comes under the force of their provisions. In every case, then, we shall consult the social object of the law under examination ; that will be the only key to the problem of conflicts, the rule by which we shall resolve whether a law should be regarded as territorial or extraterritorial. . . .

Like the needs which it is their purpose to satisfy, laws can have one only of two objects : to protect the private interests of individuals, or to secure the conditions of existence and the functional operations of the body politic. That is their social object, the result to which they tend ; a result which concerns the legislator only by reason of the influence it exercises on the condition of society. To the first category will belong laws which have for their end to place the individual in the position most favorable for his development and preservation ; such are laws of the family, which have for end to establish in the persons concerned a unity of interests and responsibilities conforming to their natural affinities ; in the same way, laws which have for end to advise, to guide those who cannot look out for themselves ; finally, those which will have the good result of saving one from his own devices. To the same category belong laws destined to assure to every one the fruits of his toil. The second class of laws is made up of those which have for their end to determine the general conditions of society ; one will generally recognize them easily by the circumstance that within the borders of a country they interest all persons equally, whatever their condition, because the interest of each one in having them observed is the same as the interest all have in the maintenance of the political body based upon them. . . .

Laws for individual protection should be extraterritorial. This is in fact implicitly included in the very idea of protection. For protection to be efficacious it must be complete, or, to return to familiar terms, continuous. It should be continuous in time and space ; suffer no interruption, for one moment of interruption always compromises, and may suffice to ruin the effect of long continued protection. It must be continuous in space, by which we understand that the person should

be protected everywhere; and if, as often happens, he owns goods in several countries, thus subjected in fact to several different sovereignties, the law which protects him should extend to all his interests in spite of differences in the laws which complicate matters. All protection is armor, which does not fulfil its office unless it is without flaw. . . .

Laws for the security of society include all provisions deemed by the legislature necessary to the existence of the State, and to the performance of its various functions. It is of the first importance that within a country all wills without exception, including both natives and foreigners, should yield obedience to laws for the security of society. These laws are imposed on citizens only because they are absolutely requisite for the interest of society; those sacrifices of interest required of citizens may all the more be required of foreigners, mere guests. . . .

Does a law have in view individual interests or the interests of society? Supposing it to be applied, is it the individual to whom it is applied who will be benefited, or is it society as a whole? . . . One may ask (which amounts to the same thing) whether an individual or the body politic would suffer loss by its repeal or non-enforcement. . . .

A third method may be usefully employed in the most embarrassing cases. When a law has been made for the purpose of the security of society, all citizens profit equally every time it is applied; if it has been made for the protection of individuals, those benefit by it directly who enjoy the rights it creates, and the common good is only an indirect and minor consequence of the good of those individuals. Let us consider together two doctrines, the right and the lack of right, respectively, to establish paternity. They seem equally to concern the State and individuals. The law which authorizes the establishment of paternity may seem to be a law for the security of society, for it facilitates the natural classification of individuals; but it is easy to see that society derives advantage from its provisions only as a result of the fortunate effect which its application has upon the condition of the parties. To the legitimate child it is a matter of entire indifference. On the other hand, the law which forbids it has evidently been passed not out of favor to the seducer, but by reason of a quite legitimate fear of the scandal which such suits cause. No one can claim an individual interest in the application of this law, but all the members of society have an equal interest in its being observed; the interest is entirely political, and the rule should be regarded as territorial.

## SECTION II.

## CAPACITY.

## MALE v. ROBERTS.

NISI PRIUS, IN THE COMMON PLEAS. 1800.

[Reported 3 *Espinasse*, 163.]

ASSUMPSIT for money paid, laid out, and expended, to the use of the defendant; money lent and advanced, with the other common money counts.

Plea of the general issue.

The case, as opened by the plaintiff's counsel, was, that the plaintiff and the defendant were performers at the Royal Circus. While the company were performing at Edinburgh, in Scotland, the defendant had become indebted to one Cockburn, for liquors of different sorts, with which Cockburn had furnished him; not having discharged the debt, and it being suspected that the defendant was about to leave Scotland, Cockburn arrested him, by what is there termed a Writ of Fugé, the object of which is to prevent the debtor from absconding.

The defendant being then unable to pay the money, the plaintiff paid it for him; and he was liberated. The present action was brought to recover the money so paid, as money paid to his use.

The defence relied upon was, that the defendant was an infant when the money was so advanced.

LORD ELDON. It appears from the evidence in this cause, that the cause of action arose in Scotland; the contract must be therefore governed by the laws of that country where the contract arises. Would infancy be a good defence by the law of Scotland, had the action been commenced there?

*Best*, Sergeant, for the defendant, contended, that the contract was to be governed by the laws of England; in which case, the plaintiff could recover for necessities only. That at all events it should not be presumed that the laws were different; and as it appeared that the debt did not accrue for necessities, the plaintiff could neither recover on the counts for money paid, or for money lent to an infant.

LORD ELDON. What the law of Scotland is with respect to the right of recovering against an infant for necessities, I cannot say; but if the law of Scotland is, that such a contract as the present could not be enforced against an infant, that should have been given in evidence; and I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The

law of the country where the contract arose, must govern the contract; and what that law is, should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is, without evidence.

The plaintiff failed in proving his case, and was nonsuited.<sup>1</sup>

### COOPER v. COOPER.

HOUSE OF LORDS (SCOTCH APPEAL). 1888.

[Reported 13 Appeal Cases, 88.]

LORD HALSBURY, L. C.<sup>2</sup> My Lords, in this case the appellant, the widow of a domiciled Scotchman, seeks to set aside an antenuptial contract executed by her on the day of her marriage.

A question has been raised whether the contract was not in fact executed after the celebration of the marriage; but, without minutely considering the evidence, I am satisfied with the conclusion of the Lord Ordinary, that the contract was executed before the marriage, a conclusion which, indeed, is but feebly contested on the other side.

A Scottish widow is entitled to her *jus relictæ* and to her terce, unless they have been discharged; and the appellant seeks to remove the bar to these rights by setting aside the contract in question which, if unimpeached, discharges these rights.

My Lords, I think there has been some slight confusion between the question what forum can decide the controversy between the parties and what law that forum should administer in deciding it. Now it is admitted that the appellant was a domiciled Irishwoman at the time she executed the instrument in question. It is admitted she was a minor; and apart altogether from the remedy peculiar to Scottish jurisprudence of setting aside a contract which operates to the enorm lesion of a minor, a question to be determined in a great measure by the position of the parties and the provisions of the contract itself, the first question arises here whether a domiciled Irishwoman could bind herself at all, while a minor, by a contract executed in Ireland.

There can be no doubt as to what would be the rule of English law in this respect. The line of cases which were brought to your Lordships' attention upon the subject of provisions whereby the common-law right of dower was extinguished seem to me beside any question in this case. The statute created the power of extinguishing the right to dower, and Courts of Equity have from time to time considered and

<sup>1</sup> Acc. *U. S. v. Garlinghouse*, 4 Ben. 194 (*semble*); Appeal of Huey, 1 Grant Cas. 51. See *Thompson v. Ketchum*, 8 Johns. 190; where it was assumed that the law of the place of contracting governed, but in the absence of evidence that defendant was by that law incapable the plaintiff recovered. — Ed.

<sup>2</sup> Parts of the opinions only are given. — Ed.

acted upon their view how far the provision for the wife has complied with the conditions of the statute; but such cases have no relation to the question of a minor's capacity by his or her act to part with rights with which the law would otherwise invest them. None of these cases relate to the question of incapacity to contract by reason of minority, and the capacity to contract is regulated by the law of domicil. Story has with his usual precision laid down the rule (*Conflict of Laws*, § 64) that if a person is under an incapacity to do any act by the law of his domicil, the act when done there will be governed by the same law wherever its validity may come into contestation with any other country: *quando lex in personam dirigitur respiciendum est ad leges illius civitatis quæ personam habet subjectam*.

There is an unusual concurrence in this view amongst the writers on international law: *qua ætate minor contrahere possit et ejusmodi respicere oportet ad legem, cujusque domicilii*: Burgundus, *Tract* 2, n. 6. C'est ainsi que la majorité et la minorité du domicile ont lieu partout même pour les biens situés ailleurs: 1 Boullenois, *Princip. Gen.* 6. Quotiescunque de habilitate aut de inhabilitate personarum queratur, toties domicilii leges et statuta spectanda: D'Argentré. So also J. Voet: Quoties in quæstione, an quis minor vel majorennis sit, obtinuit, id dijudicandum esse ex lege domicilii; sit ut in loco domicilii minorennis, ubique terrarum pro tali habendus sit, et contra.

It is said that the familiar exception of the place where the contract is to be performed prevents the application of the general rule, and that as both parties contemplated a Scottish married life, and as a consequence a Scottish domicil, the principle I have spoken of does not regulate the contract relations of these two persons. I think two answers may be given to this contention. In the first place, I think it is a misapplication of the principle upon which the exception is founded. Here there is no contractual obligation to make Scotland the domicil, nor is there any part of the contract which could not and ought not to receive complete fulfilment even if (contrary to what I admit was the contemplation of both the parties) the place of married life should remain in Ireland as if they had emigrated altogether and gone to some other country.

But another and a more overwhelming answer is to be found in this, that the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails. . . .

LORD WATSON. . . . Whether the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicil, or by the *lex loci contractus*, has been a fertile subject of controversy. In the present case it is unnecessary to decide the point, because Ireland was the country of the appellant's domicil, and also the place where the contract was made. It was argued, however, for the respondents, that the appellant's objection to the contract, although it rests upon her alleged incapacity to give consent, must be decided by the law of Scotland, as the *lex loci solutionis*. I am by no means

satisfied that Scotland was, in the proper sense of the phrase, the place of performance of the contract. The spouses no doubt intended to reside in Scotland, but they must also have intended that the contract should remain in force and be performed in any other country where they might, from choice or necessity, take up their abode. Apart from that consideration, and assuming Scotland to have been, in the strictest sense of the term, the *locus solutionis*, I think the argument of the respondents is untenable. The principle of international private law, which makes, in certain cases, the law of the place where it is to be performed the legal test of the validity of a contract, rests, in the first place, upon the assumption that the parties were, at the time when they contracted, both capable of giving an effectual consent; and, in the second place, upon an inference derived from the terms of the document, or from the circumstances of the case, that they mutually agreed to be bound by the *lex loci solutionis* in all questions touching its validity. That principle can, in my opinion, have no application to a case in which, at the time when they professed to contract, one of the parties was, according to the law of that party's domicile and also of the place of contracting, incapable of giving consent. . . .

LORD MACNAGHTEN. . . . It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favor of the law of the domicile. It may be that all cases are not to be governed by one and the same rule. But when the contract is made in the place where the person whose capacity is in question is domiciled there can be no room for dispute. It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile. . . .

*Appeal allowed.*<sup>1</sup>

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MILLIKEN v. PRATT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1878.

[Reported 125 Massachusetts, 374.]

CONTRACT to recover \$500 and interest from January 6, 1872. Writ dated June 30, 1875. The case was submitted to the Superior Court on agreed facts, in substance as follows:

The plaintiffs are partners doing business in Portland, Maine, under

<sup>1</sup> See *In re Cooke's Trusts*, 56 L. J. Ch. 637. — ED.

the firm name of Deering, Milliken & Co. The defendant is, and has been since 1850, the wife of Daniel Pratt, and both have always resided in Massachusetts. In 1870, Daniel, who was then doing business in Massachusetts, applied to the plaintiffs at Portland for credit, and they required of him, as a condition of granting the same, a guaranty from the defendant to the amount of five hundred dollars, and accordingly he procured from his wife the following instrument:

“Portland, January 29, 1870. In consideration of one dollar paid by Deering, Milliken & Co., receipt of which is hereby acknowledged, I guarantee the payment to them by Daniel Pratt of the sum of five hundred dollars, from time to time as he may want — this to be a continuing guaranty. Sarah A. Pratt.”

This instrument was executed by the defendant two or three days after its date, at her home in Massachusetts, and there delivered by her to her husband, who sent it by mail from Massachusetts to the plaintiffs in Portland; and the plaintiffs received it from the post-office in Portland early in February, 1870.

The plaintiffs subsequently sold and delivered goods to Daniel from time to time until October 7, 1871, and charged the same to him, and, if competent, it may be taken to be true, that in so doing they relied upon the guaranty. Between February, 1870, and September 1, 1871, they sold and delivered goods to him on credit to an amount largely exceeding \$500, which were fully settled and paid for by him. This action is brought for goods sold from September 1, 1871, to October 7, 1871, inclusive, amounting to \$860.12, upon which he paid \$300, leaving a balance due of \$560.12. The one dollar mentioned in the guaranty was not paid, and the only consideration moving to the defendant therefor was the giving of credit by the plaintiffs to her husband. Some of the goods were selected personally by Daniel at the plaintiffs' store in Portland, others were ordered by letters mailed by Daniel from Massachusetts to the plaintiffs at Portland, and all were sent by the plaintiffs by express from Portland to Daniel in Massachusetts, who paid all express charges. The parties were cognizant of the facts.

By a statute of Maine, duly enacted and approved in 1866, it is enacted that “the contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole.” The statutes and the decisions of the court of Maine may be referred to.

Payment was duly demanded of the defendant before the date of the writ, and was refused by her.

The Superior Court ordered judgment for the defendant; and the plaintiffs appealed to this court.

GRAY, C. J. The general rule is that the validity of a contract is to be determined by the law of the State in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a State whose laws do not permit such a contract. *Scudder v. Union National Bank*, 91 U. S. 406. Even a contract expressly



prohibited by the statutes of the State in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the State, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own citizens abroad in a State the laws of which permit it. *Greenwood v. Curtis*, 6 Mass. 358; *M'Intyre v. Parks*, 3 Met. 207.

If the contract is completed in another State, it makes no difference in principle whether the citizen of this State goes in person, or sends an agent, or writes a letter, across the boundary line between the two States. As was said by Lord Lyndhurst, "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." *Pattison v. Mills*, 1 Dow & Cl. 342, 363. So if a person residing in this State signs and transmits, either by a messenger or through the post-office, to a person in another State, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other State, or wrote and signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this Commonwealth. *M'Intyre v. Parks*, above cited.

The guaranty, bearing date of Portland, in the State of Maine, was executed by the defendant, a married woman, having her home in this Commonwealth, as collateral security for the liability of her husband for goods sold by the plaintiffs to him, and was sent by her through him by mail to the plaintiffs at Portland. The sales of the goods ordered by him from the plaintiffs at Portland, and there delivered by them to him in person, or to a carrier for him, were made in the State of Maine. *Orcutt v. Nelson*, 1 Gray. 536; *Kline v. Baker*, 99 Mass. 253. The contract between the defendant and the plaintiffs was complete when the guaranty had been received and acted on by them at Portland, and not before. *Jordan v. Dobbins*, 122 Mass. 168. It must therefore be treated as made and to be performed in the State of Maine.

The law of Maine authorized a married woman to bind herself by any contract as if she were unmarried. St. of Maine of 1866, c. 52; *Mayo v. Hutchinson*, 57 Maine, 546. The law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of any third person. Gen. Sts. c. 108, § 3; *Nourse v. Henshaw*, 123 Mass. 96. Since the making of the contract sued on, and before the bringing of this action, the law of this Commonwealth has been changed, so as to enable married women to make such contracts. St. 1874, c. 184; *Major v. Holmes*, 124 Mass. 108; *Kenworthy v. Sawyer*, 125 Mass. 28.

The question therefore is, whether a contract made in another State by a married woman domiciled here, which a married woman was not

at the time capable of making under the law of this Commonwealth, but was then allowed by the law of that State to make, and which she could now lawfully make in this Commonwealth, will sustain an action against her in our courts.

It has been often stated by commentators that the law of the domicile, regulating the capacity of a person, accompanies and governs the person everywhere. But this statement, in modern times at least, is subject to many qualifications; and the opinions of foreign jurists upon the subject, the principal of which are collected in the treatises of Mr. Justice Story and of Dr. Francis Wharton on the Conflict of Laws, are too varying and contradictory to control the general current of the English and American authorities in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicile, be deemed capable of making it.<sup>1</sup>

Mr. Westlake, who wrote in 1858, after citing the decision of Lord Eldon,<sup>2</sup> well observed, "That there is not more authority on the subject may be referred to its not having been questioned;" and summed up the law of England thus: "While the English law remains as it is, it must, on principle, be taken as exceeding, in the case of transactions having their seat here, not only a foreign age of majority, but also all foreign determination of status or capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the continent." "The validity of a contract made out of England, with regard to the personal capacity of the contractor, will be referred in our courts to the *lex loci contractus*; that is, not to its particular provisions on the capacity of its domiciled subjects, but in this sense, that, if good where made, the contract will be held good here, and conversely." Westlake's Private International Law, §§ 401, 402, 404.<sup>3</sup>

In *Greenwood v. Curtis*, Chief Justice Parsons said, "By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this State; although such contract may not be valid by our laws, or even may be

<sup>1</sup> The learned Chief Justice here examined the following cases: *Ex parte Lewis*, 1 Ves. Sen. 298; *Morrison's Case*, Mor. Dict. Dec. 4595; *Ex parte Watkins*, 2 Ves. Sen. 470; *In re Houston*, 1 Russ. 312; *Johnstone v. Beattie*, 10 Cl. and F. 42; *Stuart v. Bute*, 9 H. L. C. 440; *Nugent v. Vetzera*, L. R. 2 Eq. 704; *Woodworth v. Spring*, 4 All. 321; *Male v. Roberts*, 3 Esp. 163; *Thompson v. Ketcham*, 8 Johns. 189. — Ed.

<sup>2</sup> *Male v. Roberts*, *supra*. — Ed.

<sup>3</sup> The learned Chief Justice here stated *In re Hellmann's Will*, L. R. 2 Eq. 363; and criticised the following Louisiana cases: *Baldwin v. Gray*, 16 Mart. 192; *Saul v. His Creditors*, 17 Mart. 569; *Andrews v. His Creditors*, 11 La. 464; *Le Breton v. Nouchet*, 3 Mart. 60; *Barrera v. Alpunte*, 18 Mart. 69; *Garnier v. Poydras*, 13 La. 177; *Gale v. Davis*, 4 Mart. 645. — Ed.

prohibited to our citizens;" and that the Chief Justice considered this rule as extending to questions of capacity is evident from his subsequent illustration of a marriage contracted abroad between persons prohibited to intermarry by the law of their domicile. 6 Mass. 377-379. The validity of such marriages (except in case of polygamy, or of marriages incestuous according to the general opinion of Christendom) has been repeatedly affirmed in this Commonwealth. *Medway v. Needham*, 16 Mass. 157; *Sutton v. Warren*, 10 Met. 451; *Commonwealth v. Lane*, 113 Mass. 458.

The recent decision in *Sottomayor v. De Barros*, 3 P. D. 1, by which Lords Justices James, Baggallay, and Cotton, without referring to any of the cases that we have cited, and reversing the judgment of Sir Robert Phillimore in 2 P. D. 81, held that a marriage in England between first cousins, Portuguese subjects, resident in England, who by the law of Portugal were incapable of intermarrying except by a Papal dispensation, was therefore null and void in England, is utterly opposed to our law; and consequently the dictum of Lord Justice Cotton, "It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile," is entitled to little weight here.

It is true that there are reasons of public policy for upholding the validity of marriages, that are not applicable to ordinary contracts; but a greater disregard of the *lex domicilii* can hardly be suggested, than in the recognition of the validity of a marriage contracted in another State, which is not authorized by the law of the domicile, and which permanently affects the relations and the rights of two citizens and of others to be born.

Mr. Justice Story, in his *Commentaries on the Conflict of Laws*, after elaborate consideration of the authorities, arrives at the conclusion that "in regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made, or the act done;" or as he elsewhere sums it up, "although foreign jurists generally hold that the law of the domicile ought to govern in regard to the capacity of persons to contract; yet the common law holds a different doctrine, namely, that the *lex loci contractus* is to govern." *Story Conf. §§ 103, 241*. So Chancellor Kent, although in some passages of the text of his *Commentaries* he seems to incline to the doctrine of the civilians, yet in the notes afterwards added unequivocally concurs in the conclusion of Mr. Justice Story. 2 Kent Com. 233 note, 458, 459 & note.

In *Pearl v. Hansborough*, 9 Humph. 426, the rule was carried so far as to hold that where a married woman domiciled with her husband in the State of Mississippi, by the law of which a purchase by a married woman was valid and the property purchased went to her separate

use, bought personal property in Tennessee, by the law of which married women were incapable of contracting, the contract of purchase was void and could not be enforced in Tennessee. Some authorities, on the other hand, would uphold a contract made by a party capable by the law of his domicile, though incapable by the law of the place of the contract. *In re Hellmann's Will*, and *Saul v. His Creditors*, above cited. But that alternative is not here presented. In *Hill v. Pine River Bank*, 45 N. H. 300, the contract was made in the State of the woman's domicile, so that the question before us did not arise and was not considered.

The principal reasons on which continental jurists have maintained that personal laws of the domicile, affecting the status and capacity of all inhabitants of a particular class, bind them wherever they may go, appear to have been that each State has the rightful power of regulating the status and condition of its subjects, and, being best acquainted with the circumstances of climate, race, character, manners, and customs, can best judge at what age young persons may begin to act for themselves, and whether and how far married women may act independently of their husbands; that laws limiting the capacity of infants or of married women are intended for their protection, and cannot therefore be dispensed with by their agreement; that all civilized States recognize the incapacity of infants and married women; and that a person, dealing with either, ordinarily has notice, by the apparent age or sex, that the person is likely to be of a class whom the laws protect, and is thus put upon inquiry how far, by the law of the domicile of the person, the protection extends.

On the other hand, it is only by the comity of other States that laws can operate beyond the limit of the State that makes them. In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one State to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all.

As the law of another State can neither operate nor be executed in this State by its own force, but only by the comity of this State, its operation and enforcement here may be restricted by positive prohibition of statute. A State may always by express enactment protect itself from being obliged to enforce in its courts contracts made abroad by its citizens, which are not authorized by its own laws. Under the French code, for instance, which enacts that the laws regulating the status and capacity of persons shall bind French subjects, even when

living in a foreign country, a French court cannot enforce a contract made by a Frenchman abroad, which he is incapable of making by the law of France. See Westlake, §§ 399, 400.

It is possible also that in a State where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the State, for the protection of its own citizens, that it could not be held by the courts of that State to yield to the law of another State in which she might undertake to contract.

But it is not true at the present day that all civilized States recognize the absolute incapacity of married women to make contracts. The tendency of modern legislation is to enlarge their capacity in this respect, and in many States they have nearly or quite the same powers as if unmarried. In Massachusetts, even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business, and earnings; and, before the bringing of the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action.

*Judgment for the plaintiffs.*<sup>1</sup>

## FREEMAN'S APPEAL.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1897.

[Reported 68 *Connecticut*, 533.]

BALDWIN, J. Mrs. Mitchell, being a citizen of Connecticut, married a citizen of Connecticut in 1857, and they continued to reside in this State until his death. Her marriage gave her, under the laws of the State then in force, substantially the status which belonged to a married woman at common law. Her personal identity, from a juridical point of view, was merged in that of her husband. Thereafter, during coverture, she could make no contract that would be binding upon her, even by his express authority. 1 Swift's Dig. 30. If she assumed to make such a contract, it was absolutely void.

These personal disabilities the common law imposed partly for the protection of the husband, and partly for that of the wife. To preserve

<sup>1</sup> *Acc.* Bowles v. Field, 78 Fed. 742; Bell v. Packard, 69 Me. 105; Wood v. Wheeler, 111 N. C. 231, 16 S. E. 418; Baum v. Birchall, 150 Pa. 164, 24 Atl. 620; Case v. Dodge, 18 R. I. 661, 29 Atl. 785. *Contra*, Guépratte v. Yonug, 4 De G. and S. 217; Matthews v. Murchison, 17. Fed. 760 (*semble*). See Hill v. Pine River Bank, 45 N. H. 300. — Ed.

what property rights remained to her, as far as might be, against his creditors, various statutes were from time to time enacted, until this long ago became recognized as the established policy of the State. *Jackson v. Hubbard*, 36 Conn. 10, 15. These statutes were mainly designed to protect her against others. The common law was sufficient to protect her against herself, and prior to 1877 it precluded her from making any contract as surety for her husband. *Kilbourn v. Brown*, 56 Conn. 149. A statute of that year establishes a different rule for women married after its enactment, but does not enlarge the rights of those previously married. General Statutes, § 2796.

Whenever a peculiar status is assigned by law to the members of any particular class of persons, affecting their general position in or with regard to the rest of the community, no one belonging to such class can vary by any contract the rights and liabilities incident to this status. Anson's Principles of Contract, 328. If he could, his private agreements would outweigh the law of the land. *Jus publicum privatorum pactis mutari non potest*.

Coverture constitutes such a status, and one of its incidents in this State, at the time of Mrs. Mitchell's marriage, was a total disability to contract. So far as contracts of suretyship for their husbands are concerned, the disability of women married before 1877 remains absolute, unless both husband and wife have executed for public record a written contract, by which both accede to the provisions of the statute of that year and accept the rights which it offers to them. General Statutes, § 2798. No such contract was ever executed by Mrs. Mitchell.

The claim in favor of the First National Bank of Chicago which has been allowed by the commissioners on her estate, was founded on a debt due from a mercantile firm in Illinois of which her husband was a member, for which she had assumed to make herself responsible, as guarantor, by a writing dated in Illinois but signed in this State. The creditor had agreed, in Illinois, with the firm to forbear suit if she and they (as a firm and individually) would become parties to such a paper; and, after they had signed it there, had given it to her husband, in Illinois, to take to her, in this State, for execution. He procured her signature and then mailed the instrument to one of his partners at Chicago, by whom it was there delivered to the bank. The agreement of forbearance had been conditioned on the execution of the guaranty by the firm, its individual members, and Mrs. Mitchell. It was her credit only that was to give it value. Its execution by the others gave the bank nothing which it did not have, as fully, before. It did not become complete until it received her signature. It did not then become operative as a security, until it had been delivered to the creditor.

Her husband cannot be deemed to have acted in procuring Mrs. Mitchell's signature, as the agent of the bank. No finding to that effect was made by the trial court, and no such agency is implied from the circumstances of the transaction. He had a direct interest in obtaining the desired extension of credit. He was a principal in the

obligation. He sent the paper, as soon as it was completed, not to the bank, but to another of the principals. If he represented any one but himself, it was his copartners. The delivery of the paper by his wife to him, therefore, after her signature had been attached, was not a delivery to the bank, but simply purported to give him authority, as her agent, to make or procure such a delivery at some subsequent time.

If, therefore, the guaranty, so far as concerns her obligation upon it, was ever delivered, it was delivered, and so first took effect, in Chicago. But its delivery there could not effect her, unless it was made by her or by her authorized agent. Morse, the partner who actually handed it to the bank, stood in no better position than her husband, whether regarded as the servant of the latter, or as a partner with him. In either case, the agency, by virtue of which the delivery was made, was created, if at all, in Connecticut.

But to create an agency is to enter into a contractual relation. Mrs. Mitchell had no capacity to make any contract whereby her legal position in respect to all or any of the other members of the community would be varied. It would have varied it in respect to her husband, could she have constituted him her agent to put her, by the delivery of an instrument of guaranty, in the situation of a surety for his debt to a third party. He therefore derived no authority from her to make the delivery to the bank, and, as to her, the instrument never was delivered.

It is true, that the guaranty, if a binding contract, was a contract made in Illinois. It might also be assumed, so far as concerns the law of this case (although this is a point as to which we express no opinion), that it was one to be performed in Illinois, and that as to the principals in the transaction it was fully an Illinois contract, and to be governed by the law of Illinois, as respects any question as to its validity. By that law, a married woman was free to enter into such an engagement, and to constitute an agent for that purpose. But the *lex loci contractus* is a rule of decision only when there is a contract, so made as to be subject to that law. It is a *petitio principii* to say that because the guaranty was delivered in Chicago, it is therefore to be held effectual or ineffectual, as against Mrs. Mitchell, by the law of that place. The underlying question is, was it, as to her, ever delivered at all? It was not so delivered unless delivered by her authority; and by the laws of Connecticut, where she assumed to give such authority, she could not give it. *Cooper v. Cooper*, L. R. 13 App. Cases, 88, 99, 100; Story on the Conflict of Laws, §§ 64, 65, 66 *a*. 136; Dickey on the Conflict of Laws, Chap. XVIII. Rule 123.

Had Mrs. Mitchell been within the State of Illinois, when she signed the guaranty, it may be that her personal presence would have so far made her a resident of that State as to subject her to its laws, in respect to acts done within its jurisdiction. But as whatever was done in Illinois to bind her to the bank was done under an agency constituted in Connecticut, it is the law of Connecticut which must determine as to

the authority of the agent, and so as to the validity of the obligation which he, as such, undertook to impose upon her by the delivery in Chicago of the paper signed by her in Bristol.

The order drawn by Mrs. Mitchell on the executor of her father's will, directing him to pay over to the bank whatever might otherwise be coming to her as part of the estate in his hands, though dated at Chicago, was brought to her in behalf of the bank in Connecticut, signed and given back to the agent of the bank in Connecticut, accepted by the executor in Connecticut, and then mailed in Connecticut by its agent to the bank at Chicago. The whole transaction, therefore, was completed here. The order became operative, if at all, to transfer her interest in her father's estate, when the executor had notice of it, and agreed to comply with it by handing his written acceptance to the agent of the bank. That Mr. Mitchell was acting in that capacity seems clear from the finding that the bank, after the firm had become insolvent and made an assignment for the benefit of its creditors, prepared the paper and sent it to him, to procure her signature to it. No assignment which she could make would benefit the firm. If its result was to satisfy the claim of the bank, she would be subrogated to its place, and their creditors would receive no greater dividend. The order, also, was for the payment of a share in the estate of a deceased citizen of Connecticut, in course of settlement in its courts. Under these circumstances, its validity must be determined by the laws of Connecticut, and being dependent on the contractual act of a married woman, not for the benefit of herself, her family, or her estate, it was void.

There have been cases not differing essentially in principle from that at bar, in which courts, to whose opinions great consideration is due, have come to conclusions varying from those which we have reached. The leading one is *Milliken v. Pratt*, 125 Mass. 374. There a guaranty by a married woman of such debts as her husband might thereafter contract was signed in Massachusetts, delivered there by her to him, and by him there mailed to the other party, in Maine. The court held that the contract became complete when the guaranty was received and acted upon by the latter, and not before; and enforced it as one made and to be performed in Maine, where married women then had power to enter into such agreements. No reference was made to the fact (which may, perhaps, have been immaterial under the laws of Massachusetts), that the delivery was made by the husband, acting as the agent of the wife, — a fact which, in our view under the common law of Connecticut, is of controlling importance.

Engagements which coverture prevents a woman from making herself, she cannot make through the interposition of an agent, whom she assumes to constitute as such in the State of her domicile. If this were not so, the law could always be evaded by her appointment of an attorney to act for her in the execution of contracts. No principle of comity can require a State to lend the aid of its courts to enforce a security



which rests on a transgression of its own law by one of its own citizens, committed within its own territory. Such was, in effect, the act by which Mrs. Mitchell undertook to do what she had no legal capacity to do, by making her husband her agent to deliver the guaranty to the bank. He had no more power to make it operative by delivery in Chicago to one of his creditors in Illinois, than he would have had to make it operative by delivery here, had it been drawn in favor of one of his creditors in Connecticut. It is not the place of delivery that controls, but the power of delivery.

The Superior Court is advised to disallow all and every part of the claim of the First National Bank.

In this opinion the other judges concurred.

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### NICHOLS & SHEPARD COMPANY v. MARSHALL.

SUPREME COURT OF IOWA. 1899.

[Reported 108 Iowa, 518.]

DEEMER, J. Defendant is a married woman domiciled in this State. On or about the ninth day of July, 1894, she signed the note in suit, in the State of Indiana, at which place she was temporarily visiting, as surety for Milton W. Gregory. The note was made payable at the Indiana National Bank of Indianapolis. The laws of Indiana (section 6964, Burns' Rev. St.) provide that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." It is insisted on behalf of appellant that as defendant was domiciled in this State at the time she made the note, her capacity to contract followed her into the State of Indiana, and validated her contract made in that commonwealth, and that the right of a married woman to make a contract relates to her contractual capacity, and, when given by the law of the domicil, follows the person. Our statutes permit the making of contracts of suretyship by married women, and, if appellant's postulate be correct, it follows that plaintiff is entitled to recover. The general rule seems to be, however, that the validity, nature, obligation, and interpretation of contracts are to be governed by the *lex loci contractus aut actus*. Savary v. Savary, 3 Iowa, 272; Boyd v. Ellis, 11 Iowa, 97; Arnold v. Potter, 22 Iowa, 194; McDaniel v. Railway Co., 24 Iowa, 417; Burrows v. Stryker, 47 Iowa, 477; Bigelow v. Burnham, 90 Iowa, 300. The rule is also well settled that personal status is to be determined by the *lex domicilii*. Ross v. Ross, 129 Mass. 243. Continental jurists have generally maintained that personal laws of the domicil, affecting the status and capacity of all inhabitants of a particular class, bind them, wherever they may go, and that the validity of all contracts, in so far as the capacity of the

parties to contract is involved, depends upon the *lex domicilii*. Thus, the Code of Napoleon enacts, "The laws concerning the status and capacity of persons govern Frenchmen, even when residing in a foreign country." See also Story, Conflict of Laws (8th ed.), §§ 63-66; Wharton, Conflict of Laws (2d ed.), § 114. Some of the English cases have also followed this rule. *Guepratte v. Young*, 4 De Gex & S. 217, 5 Eng. Ruling Cas. 848; *Sottomayor v. De Barros*, 47 Law J. Prob. 23, 5 Eng. Ruling Cas. 814. But see, apparently to the contrary, *Burrows v. Jemino*, 2 Strange, 733; *Heriz v. De Casa Riera*, 10 Law J. Ch. 47. We do not think the continental rule is applicable to our situation and condition. A State has the undoubted right to define the capacity or incapacity of its inhabitants, be they residents or temporary visitors; and in this country, where travel is so common, and business has so little regard for State lines, it is more just, as well as more convenient, to have regard to the laws of the place of contract, as a uniform rule operating on all contracts, and which the contracting parties may be presumed to have had in contemplation when making their contracts, than to require them, at their peril, to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all. Indeed, it is a rule of almost universal application that the law of the State where the contract is made and where it is to be performed enters into, and becomes a part of that contract, to the same extent and with the same effect as if written into the contract at length. Each State must prescribe for itself who of its residents have capacity to contract, and what changes shall be made, if any, in the disabilities imposed by the common law. Thus, in *Thompson v. Ketchum*, 8 Johns. 192, the note was made in Jamaica. The defence was infancy, according to the laws of New York. It was determined that the transaction was subject to the laws of the place of contract, and that infancy was a defence, or not, according to the laws of Jamaica. Mr. Justice Story, in his commentaries on Conflict of Laws, says: "In regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, where the contract is made or the act done." Story, Conflict of Laws, §§ 103, 241. See, also, 2 Kent Commentaries, 233, note; 2 Kent Commentaries, 458; 2 Kent Commentaries, 459, note. It will be observed that Chancellor Kent, in some passages of his text, seems to incline to the civilian doctrine, yet the notes clearly indicate that he concurs with Justice Story. See further, on this subject, Story, Conflict of Laws (4th ed.), §§ 101, 102. The case of *Pearl v. Hansborough*, 9 Humph. 426, is almost exactly in point. In that case a married woman, domiciled with her husband in the State of Mississippi,

by the law of which a purchase by a married woman was valid, and the property purchased went to her separate use, bought personal property in Tennessee, by the law of which married women were incapable of contracting. The contract was held void and unenforceable in Tennessee. See, also, *Male v. Roberts*, 3 Esp. 163; *Milliken v. Pratt*, 125 Mass. 374; *Carey v. Mackey*, 82 Me. 516, 17 Am. St. 500 (20 Atl. Rep. 84); *Baum v. Birchall*, 150 Pa. St. 164 (24 Atl. Rep. 620); 2 *Parsons, Contracts* (8th ed.), \*574, note; 2 *Parsons, Contracts*, \*575-\*578. *Saul v. Creditors*, 5 Mart. (n. s.) 569, seems to be opposed to this rule. But as the case is from Louisiana, which State follows the civil law, it is not an authority. We may safely affirm, with Chancellor Kent, that while the continental jurists generally adopt the law of domicile, supposing it to come in conflict with the law of the place of contract, the English common law adopts the *lex loci contractus*. Lord Eldon, in *Male v. Roberts*, *supra*, said: "It appears from the evidence in this case that the cause of action arose in Scotland, and the contract must be therefore governed by the laws of that country, where the contract arises. Would infancy be a good defence by the laws of Scotland, had the action been commenced there? What the law of Scotland is with respect to the right of recovering against an infant for necessaries, I cannot say; but, if the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given in evidence, and I hold myself not warranted in saying that such a contract is void by the law of Scotland because it is void by the law of England. The law of the country where the contract arose must govern the contract, and what that law is should be given in evidence to me as a fact. No such evidence has been given, and I cannot take the fact of what that law is without evidence." It would seem, in this case, though not distinctly stated, that both parties were domiciled in England. The result of the application of these rules is that the contract was void where executed, and will not be enforced by the courts of this State.

*Affirmed.*

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SWANK v. HUFNAGLE.

SUPREME COURT OF INDIANA. 1887.

[*Reported 111 Indiana, 453.*]

ELLIOTT, J. The appellant sued the appellee, Melissa Hufnagle, and her husband, upon a note and mortgage executed in Darke County, Ohio, on land situate in this State. The appellee, Melissa Hufnagle, answered that she was a married woman, and that the mortgage was executed by her as the surety of her husband, and assumed to convey land in this State owned by her. The appellant replied that the con-

tract was made in Ohio, and that by a statute of that State a married woman had power to execute such a mortgage, but the statute of Ohio is not set forth.

The trial court did right in adjudging the reply bad. The validity of the mortgage of real property is to be determined by the law of the place where the property is situated. Mr. Jones says: "A mortgage of course takes effect by virtue of the law of the place where the land is situated." 1 Jones, Mortg. § 823. This is well settled law. Story, Conflict of Laws (8th ed.), 609 auth. n.; Bethell v. Bethell, 92 Ind. 318.

Judge Story, in sections 66 and 102 of his work on the Conflict of Laws, does not treat of conveyances or mortgages of land, but of contracts of an entirely different class, so that the appellant gets no support from what is there laid down as the law.

Under the act of 1881 a mortgage executed by a married woman as surety on land owned by her in this State is void.

There is another reason for adjudging the reply bad, and that is this, it does not set out the foreign statute on which it professes to be based. It is well settled that where a pleading is founded on a foreign statute the statute must be set forth. Wilson v. Clark, 11 Ind. 385; Mendenhall v. Gately, 18 Ind. 149; Kenyon v. Smith, 24 Ind. 11; Tyler v. Kent, 52 Ind. 583; Milligan v. State, *ex rel.*, 86 Ind. 553.

We cannot disturb the finding on the evidence.

*Judgment affirmed.*

#### ON PETITION FOR A REHEARING.

ELLIOTT, J. In the argument on the petition for a rehearing, counsel contend that we were in error in holding that a mortgage executed by a married woman in Ohio as surety for her husband cannot be enforced in this State, and they refer us to cases holding that the construction of a contract is governed by the law of the place where it was made. But the argument is unavailing, for counsel mistake the point in dispute. The question is not how the contract shall be construed, but had the married woman capacity to execute it? The question is one of capacity, not of construction. The trial court was not asked to construe a mortgage, but to enforce one which our statute declares shall not be enforceable. The purpose of the suit is not to obtain a judicial interpretation of a contract, but to foreclose a mortgage which our law declares a married woman has no capacity to execute.

We suppose it quite clear that if the mortgagor has no capacity to execute a deed or mortgage, the instrument cannot be enforced, although the incapacity is established by the law of the place where the land is situated. If, for instance, a married woman should execute a deed or mortgage without her husband joining with her, it could not be enforced in a State where the law required her husband to join. This is so because the question is one of power, and power

is created or withheld by the law of the place where the land lies. It is hardly necessary to cite authorities upon this elementary proposition, but there is so conveniently at hand a decision of the Supreme Court of Ohio, where the rule is affirmed, that we cite it. *Brown v. National Bank*, 44 Ohio St. 269. In that case it was said: "We are not unmindful of the principle that deeds intended to convey or encumber an interest in land situated in one State, executed in another, must derive their vitality from the laws of the former."

Our statute provides that the deeds of persons under twenty-one years of age shall be voidable, and this law would undoubtedly entitle an infant under that age to avoid a deed to land in this State executed in Ohio, and the principle in such a case is the same as that which rules here, for, in both cases, the question is one of capacity. In discussing this question an American author says: "But in reference to contracts about the sale and conveyance of land such capacity depends upon the laws of the State wherein the land is situated. This is the general ruling in America as to the law upon these subjects, in whatsoever court the question may arise, domestic or foreign. This rule applies to questions of infancy, coverture, majority, and of legal capacity generally." *Rorer, Inter-State Law*, 190; 1 *Jones, Mortg.*, § 662; 4 *Kent Com.*, star p. 441.

*Petition overruled.*<sup>1</sup>

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SELL v. MILLER.

SUPREME COURT OF OHIO. 1860.

[Reported 11 *Ohio State*, 331.]

BY THE COURT. Where a married woman over eighteen, but under twenty-one years of age, has her domicile, and joins with her husband in the execution of a mortgage, within a foreign jurisdiction, where the age of majority is fixed at twenty-one years, upon real estate situate in Ohio, held: That such mortgage is not invalid for want of capacity on her part to contract; the capacity to contract, in respect to immovables, being governed by the law of the situs, and not by the law of the domicile.

*Motion overruled.*

<sup>1</sup> *Acc. Post v. First Nat. Bank*, 138 Ill. 559, 28 N. E. 978; *Cochran v. Benton*, 126 Ind. 58; *Frierson v. Williams*, 57 Miss. 451; *Johnson v. Gawtry*, 1 Mo. App. 322; *Wood v. Wheeler*, 111 N. C. 231; *Baum v. Birchall*, 150 Pa. 164, 24 Atl. 620. *Contra*, *Kelly v. Davis*, 28 La. Ann. 773. — Ed.

## IN RE HELLMANN'S WILL.

CHANCERY. 1886.

[*Reported Law Reports, 2 Equity, 363.*]

CHRISTIAN HELLMANN, being domiciled in England, by his will bequeathed the sum of £250 to each of the two children of Charlotte Helsig. These children were a daughter, aged eighteen, and a son, aged seventeen, both resident and domiciled in Hamburg.

According to the law of Hamburg, girls become of age on completing their eighteenth year; boys, on completing their twenty-second. By the same law the father of an infant is entitled, as guardian, to receive a legacy bequeathed to the infant.

Under these circumstances the executors applied, under the Acts 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, for the direction of the court as to the payment of the legacies.

LORD ROMILLY, M. R. I am of opinion that the legacy to the daughter, who is of age according to the law of Hamburg, may be paid to her on her own receipt. The legacy to the son may be paid to him on his attaining full age according to English law or according to the law of Hamburg, whichever first happens; in the meantime it must be dealt with in the usual way as an infant's legacy.<sup>1</sup>

## WOODWARD v. WOODWARD.

SUPREME COURT OF TENNESSEE. 1889.

[*Reported 87 Tennessee, 644.*]

FOLKES, J. This is a petition by Rosa P. Woodward, filed in the Probate Court of Shelby County, against her guardian, Emmet Woodward, in which she seeks to have a settlement of his guardian accounts, and to have the balance in his hands found due paid over to her.

She alleges her domicil and residence in the State of Louisiana, and sets up and exhibits with her petition certified copies of the proceedings had in that State, whereby she has been emancipated from the disabilities of infancy, under and in pursuance of the statute of the State authorizing, in certain cases, the emancipation of persons who have attained the age of eighteen. The petition alleges that, in consequence of such decree, she is, under the laws of the State of Louisiana, of full age, and as such entitled to demand and receive her estate.

<sup>1</sup> *Acc. Donohoe v. Donohoe*, 19 L. R. Ir. 349; 13 Clunet, 472 (Austria, 22 Jan. '81). And see *Kohne's Estate*, 1 Pars. Eq. Cas. 399.

In the same way a fund will be paid over to a married woman if by the law of her domicil she is authorized to receive it independently of her husband. *Ex parte Lett*, 7 L. R. Ir. 132. — ED.

It is shown that both her parents are dead; that her father died of yellow fever, intestate, in 1873, leaving several children, all of whom are now over twenty-one years of age except petitioner, and have received from their guardian their share of their father's estate; that defendant, Emmet Woodward, was appointed guardian for herself and brothers and sisters by the Probate Court of Shelby County shortly after her father's death; that there is now in his hands about \$8,000 belonging to her, which he holds as such guardian; that shortly after her father's death, by proceedings duly had in the Probate Court of Shelby County, petitioner was adopted by C. Dickman, the husband of her maternal aunt, under and in pursuance of the statutes of Tennessee in such cases made and provided; that such adoption was with the consent and approval of the defendant, Emmet Woodward, her regular guardian; that several years thereafter C. Dickman removed from the State of Tennessee to the State of Louisiana with the view of taking up his permanent abode there, and has ever since and still does reside there, the State of Louisiana being the State of his domicile; that petitioner, after her adoption, became a member of the family of C. Dickman, her adoptive father, and did remove with him and his family to the State of Louisiana, and has ever since resided there; that Louisiana is the State of her domicile, and was at the time of the judicial proceedings therein resulting in her emancipation. She alleges in her petition that it is her desire, and to her interest, to have and receive the estate coming to her from her said father as aforesaid, by reason of the fact that it is now in the hands of the guardian, only yielding her a revenue of six per cent, charged with the commissions, expenses, and costs incident to such guardianship, while she can readily obtain a permanent eight per cent investment of her funds in the State of Louisiana, where that rate of interest is legal, freed from costs and expenses of guardianship. She insists that the State of Tennessee will recognize her majority as determined and fixed by judicial decree in the State of her domicile, and would recognize as valid any receipt, discharge, or acquittance that she might execute to her guardian for her estate now in his hands; and that the Probate Court will order and direct a settlement of accounts, and the paying over to her the balance found to be due, so that the said guardian, and his sureties on his official bond, may be discharged from all further liability.

To this petition the defendant interposed a demurrer, upon the ground that petitioner was still a minor under twenty-one years of age; that the proceedings had in the courts of Louisiana would have no extraterritorial effect by reason of the want of jurisdiction in said courts over the estate of the ward situated in Tennessee; that the proceedings had in Louisiana are unknown to the laws of Tennessee, and opposed to the policy of Tennessee law, and contrary to the interests of the citizens of Tennessee, and would, therefore, not be recognized in the courts of this State; that the said guardian is lawfully in possession of said funds under the laws of this State, and has been guilty of

no breach of duty in relation thereto; and that said petitioner, being a minor, cannot maintain this action in her own name.

The probate judge sustained the demurrer, and dismissed the petition. Petitioner has filed the record for a writ of error in this court.

There are certain general principles which control the disposition of this case. They are, in the main, well settled; the difficulty lies in their application to the particular facts of the case in hand.

"It is elementary that every State has an inherent right to determine the status or domestic or social condition of persons domiciled within its territory, except in so far as the powers in this respect are restrained by duties or obligations imposed upon them by the Constitution of the United States." *Strader v. Graham*, 10 How. 93.

Again, the civil status is governed universally by one single principle, — namely, that of domicile, — which is the criterion established by law for the purpose of determining the civil status, for it is on this basis that the personal rights of a party — that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy — must depend. *Udny v. Udny*, L. R. 1 H. L. Sc. 457.

It is not seriously controverted by counsel for defendant that the judicial decree under which the disabilities of minority were removed in Louisiana had the same effect as though, by direct statute, the age of majority had been fixed at eighteen, so far as the status of minors domiciled in that State is concerned. The main contention in this connection being that, the domicile of origin of petitioner having been in Tennessee, petitioner has acquired and could acquire no domicile in Louisiana by reason of her removal to that State by her adoptive father.

Before considering the question of removal and of the right of the adoptive father to acquire for his adopted child a new domicile, or, what is the same thing, the right or privilege of the adopted child to acquire a new domicile with her adoptive father, let us settle, if we can, what would be the proper disposition of the case had the petitioner been born and ever after domiciled in the State of Louisiana. In such cases we regard it as well settled that under unquestionable principles of private international law one State will recognize and give force and effect in its own tribunals to the legislation of another State, in so far as it fixes the status and capacity of married women and minors. This is frequently spoken of as a principle of comity; and while it doubtless has its origin in considerations of comity, it has been so repeatedly and emphatically recognized by the courts of all civilized countries that it is now thoroughly crystallized into rules and principles of private international law.

As is said in *Ross v. Ross*, 129 Mass. 243, in the elaborate discussion of the subject by Chief Justice Gray, "the status or condition of any person with the inherent capacity of succession or inheritance is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the



State in which it is called in question, and when there is nothing in those laws to prohibit giving full effect to the status and capacity in the State of the domicile.

"We are not aware of any case in England or America in which change of status in the country of the domicile, with the formalities prescribed by its laws, has not been allowed full effect as to the capacity thereby created of succeeding to and inheriting property in any other country, the laws of which hold a like change of status in a like manner, with a like effect, under like circumstances."

This principle is illustrated by the decree made *In re Da Cunha*, 1 Hagg. Ecc. R., page 237, where administration was granted in England, limited to the receipt of the dividend of a sum of English stock, to a Portuguese lady who, by the laws of her domicile, was emancipated from the disabilities of minority, but was, by the English law, still a minor. It was held that she was entitled to receive and receipt for the dividend on said stock in England.

It is true, as insisted by counsel for defendant, that there is no elaboration of decision and of discussion made by the judges in the disposition of this case, but this fact in no manner detracts from its force and effect as authority. It does settle and determine that a person of full age by the law of her domicile, though a minor by the laws of England, is entitled to receive and give a valid acquittance for property to which she is entitled in England; and such receipt, though confined to the dividend on the stock, is as conclusive of her right to act as a major as though she had received the corpus of the property, the dividend being all that she was, under the circumstances, entitled to. In Rule 32 of Dicey, we find it stated that the capacity of a person for the alienation of movables depends, so far as the question of infancy or majority is concerned, on the law of that person's domicile.<sup>1</sup>

It is suggested, however, in response to this case, that the fact that the property going to the minor was by the will given to the minor by name, is indicative of the purpose to have the same paid over to the minor, according to the law of the place of her domicile, where her majority was reached at an earlier age than in England, and that for this reason it should not be controlling in a case where the property was inherited generally in one State, where twenty-one is the lawful age, and the full age at an earlier period is had by reason of the domicile in another State.

We cannot appreciate the force of this suggestion. The court, in disposing of the case, indicates in nowise that its judgment or conclusion was influenced by any such consideration, and, so far as the case goes, it is merely an announcement, and application of the general principles contended for by petitioner. Had any special regard been given to the fact that property was devised by will, instead of passing by law, it would have been more reasonable to have supposed that the

<sup>1</sup> The court here examined *In re Hellmann's Will*, L. R. 2 Eq. 363. — ED

testator intended it to be paid over according to the law of his own domicile, requiring guardians to receive and receipt for the fund devised to minors. That the court gave no attention to such considerations, is shown by the order made with reference to the boy, in directing that the fund should be paid to him when he attained his majority, either under the law of England or under the law of his domicile, whichever first happened.

This court has recognized the doctrine contended for by petitioner in the case of *Robinson v. Queen*, decided at Nashville and reported in 87 Tennessee, 445, where it is held that the judicial proceedings, under the laws of the State of Kentucky, emancipating married women from the disability of coverture, would be recognized and enforced in this State to the extent of allowing an action to be brought and maintained in the courts of this State against such married woman, on a note made by her in the State of Kentucky as surety for her husband, clearly recognizing that her status as a person *sui juris* fixed by judicial proceedings in the State of her domicile, would have full force and effect in this State.

To the same effect is the text in Wharton's Conflict of Laws, § 114, where the learned author says :

"A foreigner who is capable of business at his domicile must be recognized as so capable by our laws, even though if domiciled among us he would be incapable."

A near analogy to the present case, with reference to the recognition in one State of the status fixed by the law of the domicile is to be found in the case of children born out of wedlock, but made legitimate afterward according to the laws of their domicile, by the subsequent marriage of their parents. They are deemed everywhere legitimate for the purposes of inheritance, etc. *Andrews v. Andrews*, 24 Ch. Div. 637; *Miller v. Miller*, 91 N. Y. 315; *Scott v. Ney*, 11 La. Ann. 232. This doctrine is generally subject to exception concerning real estate, which is governed by the *lex rei sitæ*.

The law of divorce also furnishes a close analogy. Thus a divorce in a foreign jurisdiction for a cause which is not competent in the State of marriage, is recognized as valid in the latter if the former had jurisdiction of the parties for the purposes of the suit. *Sewall v. Sewall*, 122 Mass. 158; *Clark v. Clark*, 8 Cushing, 385; *Barber v. Root*, 10 Mass. 260.

In *Stephens v. McFarland*, 8 Irish Eq. Rep. 444, we have a case where a minor was insolvent in Southern Australia, by the laws of which a minor could be so adjudged; his assignee attempted in Ireland to obtain the real and personal property that passed to him under his father's will. The bill was demurred to and the demurrer overruled, the assignee being adjudged to have the title of the property coming to the insolvent minor.

The converse of the present case is found in *Kohne's estate*, 1 Parsons' Select Eq. Cases (Penn.), 399; the direct point was that the

power of attorney of a minor, who had not reached her majority by the law of her domicile, would not be recognized in Pennsylvania, although by the law of Pennsylvania she was then of full age. The judge delivering the opinion said, among other things, "that according to our law, in common with those of the civilized world, questions of minority and majority, in all controversies respecting personal estate, are to be determined according to the laws of the country in which the minor held his actual domicile, whether natural or acquired." See Story's Conflict of Laws, §§ 64, 65, 66, and 69.

Pothier states the rule thus: "The change of domicile delivers persons from the empire of the laws of the place they have quitted, and subjects them to those of the new domicile they have acquired."

Mr. Justice Story, after presenting the several views of some of the civil law writers who discuss the subject, says, at section 71: "Boullenois himself does not hesitate to declare the general principle to be incontestable, that the law of the actual domicile decides the state and condition of the person, so that a person by changing his domicile changes at the same time his condition."

The effect of the statute of Louisiana, under which the disabilities of this minor were removed, has been adjudged by the highest court of that State.

Thus, in 36 La. Ann. 250, it is said: "It places the minor thus freed on the same plane with the major, and invests him with identically the same rights, and subject to equal responsibilities. In other words, instead of leaving him subject to the operation of the general law, and making him wait until he is twenty-one years of age, it virtually and in effect fixed and established his majority at an earlier period of life, — that is, at any time when he shall have passed the age of eighteen years." So fully is his majority established that he is capable of filling the office of administrator, just as if twenty-one years of age. 12 La. Ann. 155. Under this legislative emancipation the party's disabilities of infancy are all removed. 6 Robinson, 429; 9 La. Ann. 155; 36 La. Ann. 250. He is estopped by it, and those dealing with him need look no further than his free papers. 36 La. Ann. 616.

The case of Galbraith v. Buner, 65 Mo. 349, urged by counsel for defendant as furnishing strong authority for their contention here, is not, in our opinion, entitled to the weight insisted upon. The case is extremely brief in its discussion, and assumes the very point in controversy, without reference to the various authorities bearing thereon.

Mr. Wharton, in his work on Conflict of Laws, at section 114, says of this case that it is "exceptional" and "arbitrary." Moreover, it may be distinguished from the case now before us in this, that the proceedings in Arkansas, the State of domicile of the minor, seem to have had for its object the emancipation of the minor only *pro tanto* — that is to say, the minor's disabilities were removed to the extent of authorizing him to go into the State of Missouri and there collect and receipt for the particular fund in the hands of his Missouri guardian.

It was not an out and out removal of all the disabilities of minority, but a special commission authorizing an incursion into the State of Missouri for the purpose of receiving and receipting for a particular fund. The Arkansas statute is not before us, and we only know its contents by the statement thereof, found in this Missouri case, from which it is apparent that it differs widely from the broad and comprehensive proceedings in Louisiana, whereby the petitioner in the case at bar was thoroughly and entirely emancipated from all disabilities, and her status fixed as a major in Louisiana, from which she claims the right to have her status recognized in other sovereignties.

So far we have traveled a broad and well-defined road, from which there is no variableness nor shadow of turning, every step of which is marked by well considered authority of the highest repute.<sup>1</sup>

Under the view we take of the law governing this case, the petitioner has attained her majority under the laws of the State of her domicil, and this court, recognizing the status of capacity as thus fixed by the law of her domicil, will declare her of full age, so far as her right to demand and receive from any one having property in their possession belonging to her, to which she would be entitled upon attaining full age in this State.

In other words, being of full age in Louisiana, the State of her domicil, she is of full age in this State, under the principles of private international law obtaining in such cases.

Let the judgment be reversed, and the case remanded for further proceedings.

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### D'HERVAS *v.* BONNAR.

COURT OF CASSATION, FRANCE. 1833.

[*Reported Sirey*, 1833, I. 663.]

IN 1812 Mme. Willemiot, a Frenchwoman, married at Madrid M. d'Hervas, a Spaniard, and thus became a foreigner. Soon after their union, they removed to France, and there established themselves in business and acquired real estate.

On Nov. 9, 1820, Mme. d'Hervas became bound, jointly with her husband, as debtor to M. Bonnar for a sum of 100,000 francs, to secure which she mortgaged to him the estate of Beaugez, belonging to her.

The obligation not having been performed, M. Bonnar brought action against Mme. d'Hervas to obtain the land. She however alleged that the obligation was void, on the ground that by the Spanish law a wife cannot bind herself jointly with her husband, nor give security for him. M. Bonnar denied the application of Spanish law to

<sup>1</sup> The court proceeded to discuss the question of domicil. — ED.

an obligation contracted in France by a Spanish woman domiciled there, and secured by goods situated in France.

The Tribunal of the Seine, June 4, 1827, dismissed the action. On appeal, the Royal Court of Paris reversed the judgment.<sup>1</sup> Appeal by Mme. d'Hervas, for violation of the principles as to statute personal contained in Articles 3 and 11 of the Civil Code.

THE COURT. It is not here a question either of the status of Mme. d'Hervas, or of any right guaranteed by a diplomatic convention between France and Spain, to the citizens of one country living in the other; but of the validity of an obligation assumed in France by a foreigner, who there had a domicile and landed property. In this affair the judgment could not have violated Art. 11 of the Civil Code, since that article secures to a foreigner in France the enjoyment of the same civil rights as are granted to Frenchmen by the *treaties* of the foreigner's nation.

Though Art. 3 declares that laws concerning the status and capacity of persons govern Frenchmen even while residing in a foreign country. it contains no similar or analogous provision in favor of foreigners residing in France; whence it results that the judgment appealed from could not have violated this article.

By the terms of the same article, immovables in France owned by foreigners are governed by French law; and in deciding that Mme. d'Hervas was held to execute an obligation which she had contracted under the authority of the French laws, with a mortgage on her land situated in France, the judgment made a proper application of the French laws which govern this obligation.<sup>2</sup>

## MANAGER OF THE COURT THEATRE OF HANOVER *v.* G.

SUPREME COURT AT CELLE (HANOVER). 1846.

[Reported 13 *Seuffert's Archiv*, 102.]

THE singer Louise G. of Vienna on Nov. 9, 1840, with the assent of her mother (her pretended guardian), concluded an engagement with the Manager of the Court Theatre of Hanover. The singer G. afterwards refused to carry out the contract, and the Manager brought suit. The Austrian law, according to the Manager's contention, did not deprive of all effect the engagements of a minor entered into without the assent of her guardian; while according to the law of Hanover such engagements were null and void. The question therefore arose, by what law the legal capacity of a party to a contract must be judged.

<sup>1</sup> The judgment of the Royal Court, and the arguments in the Cassation, are omitted. — Ed.

<sup>2</sup> *Contra*, *Erambert v. Clerdent* (Liège, 31 Dec. '79). *Pasic. Belg.* 1880, 2, 122. — Ed  
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THE COURT. The rule must always be, that a court shall decide according to the law of the land. The exception to this rule, based solely on peculiar usage, according to which the minority of a foreigner is determined by the law of his domicile, cannot be extended in the decisions so as to cover the legal consequences of such minority. The effect of the defendant's agreement, attacked as the contract of a minor, is therefore to be determined by our law.

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DE LIZARDI *v.* CHAIZE.

COURT OF CASSATION, FRANCE. 1861.

[*Reported Journal du Palais*, 1862, 427.]

M. DE LIZARDI, a Mexican, then over twenty-one years old, but still a minor by Mexican law, bought of Chaize, Rigaud, Delamarre and Bablin, in 1853 and 1854, jewels to a considerable amount, and in payment signed notes and bills of exchange. In 1857, having come of age by the law of his country, M. de Lizardi summoned M. Chaize and partners before the Tribunal of the Seine, to have declared void as made during minority all the obligations he had given them.

To this petition the defendants answered that at the time they dealt with him M. de Lizardi was of age by French law; that they were ignorant of his foreign nationality; that they contracted in good faith; and that the obligations were therefore binding. They also filed a cross-claim for the payment of the amounts he owed them.

The tribunal found for the defendants upon the original petition, and allowed the cross-claim. On appeal to the Court of Paris the judgment was affirmed.<sup>1</sup> The petitioner appealed.

THE COURT. Though the statute personal, the application of which to French citizens residing in a foreign country is assured by the French civil law, may on the principle of reciprocity be invoked by foreigners residing in France, yet it is proper in applying the foreign statute to enforce restrictions and limitations without which there would be constant danger of error or surprise to the prejudice of French citizens. Though on principle one is bound to know the capacity of the person with whom one enters into a contract, the rule cannot be so strictly and rigorously applied with regard to foreigners contracting in France. Civil capacity may in fact be easily verified in the case of transactions between French citizens; but it is otherwise as to transactions that take place in France between Frenchmen and foreigners. In such a case, the Frenchman cannot be held to know the laws of various nations, and their provisions as to minority and majority and the extent of the power of foreigners to make agreements within

<sup>1</sup> The judgments of the lower courts and arguments of counsel are omitted. — ED.

the limits of their civil capacity. It is sufficient for the validity of the contract that the Frenchman has acted without laches and negligence and in good faith.

It is not shown that the defendants knew the petitioner's foreign nationality when they dealt with him; it follows from the facts found in the lower court that in making sales to him in the regular course of business they acted in entire good faith; the price, though large, was not out of proportion to Lizardi's fortune; these things were delivered in presence of his relatives and without opposition on their part; from some of the objects sold the petitioner has realized a profit; nothing could lead the present defendants to suspect that Lizardi, though aged more than twenty-one years, was yet a minor by the laws of his country.

These facts, recited in the judgment, sufficiently justify the maintenance of agreements undertaken by Lizardi with the present defendants, and no law was violated by the judgment.

*Appeal dismissed.*<sup>1</sup>

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### FOURGEAUD v. SANTO VENIA.

COURT OF PARIS. 1879.

[Reported 6 *Clunet*, 488.]

THE COURT. The fact is clear that Joseph, Count of Santo Venia, is of Spanish nationality; and at the time he accepted the drafts drawn on him by Thérèse Bimet (discounted by Fourgeaud, Simon Bugniet & Cie.) he was more than twenty-one years old, but a minor according to the Spanish law, his statute personal, which fixes the age of majority at twenty-five. The question is whether the Count of Santo Venia, who has accepted drafts in which he described himself as domiciled at Paris, can set up against *bona fide* holders his foreign nationality and his minority by the rule of his national law; and whether these *bona fide* holders were bound at their peril to ascertain the real capacity of the acceptor.

Though the laws which govern the status and capacity of persons follow those persons wherever they go, whatever be their domicile of origin, yet one must remember that the application of the foreign statute is subject to restrictions and limitations required by the legitimate interest of citizens of France who have become creditors by regular legal banking operations. Fourgeaud, Simon Bugniet *et* Cie. did not deal directly with the Count of Santo Venia; they dealt only with Thérèse Bimet,

<sup>1</sup> *Acc. Cassac v. Hartog* (Paris 1883), 10 *Clunet*, 290. In a similar case the Civil Tribunal of the Seine said: "It is a principle of natural law and of the public order of France that no one shall enrich himself at the expense of another; such a rule, like laws of police and of safety, bind, without distinction of origin or nationality, all who are on French soil." 14 *Clunet*, 178. — Ed.

his creditor. Though one may perhaps hold that Thérèse Bimet, who knew the Count of Santo Venia, was to blame for giving him credit in spite of certain facts which indicated his foreign nationality, the same blame cannot attach to bankers living far from Paris, who acted on information furnished them by the holder of the drafts, and by declarations as to domicile upon the drafts, and were therefore excusable for not having investigated a capacity which no particular fact or circumstance authorized them to suspect.

If one considers the greater interest of the security of a holder in dealing with commercial paper, a bill of exchange is sufficiently protected by holding that the bearer who has discounted the signature of a foreigner in ignorance of his quality and of the law which forbids him to contract has acted in good faith and with the degree of care which the nature of the contract requires.

It follows that the Count of Santo Venia is justified neither in law nor in fact in asserting the nullity of the obligation he has contracted.

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A. v. C.

SUPREME COURT OF AUSTRIA. 1882.

[*Reported 13 Clunet, 468.*]

A., a Prussian, came of age, according to the Prussian law, on January 24, 1878, when she reached the age of twenty-one. She married C., an Austrian, August 25, 1879; and on October 19, 1880, at Prague, she accepted a bill of exchange. Being sued by A. on the bill, she alleged that at the time of the acceptance she had not reached the age of twenty-four, and accordingly was not of age by the Austrian law, nor capable of binding herself on a bill of exchange or negotiable note.

The lower court allowed the defence on the ground that she had become Austrian by marriage, and that one who becomes an Austrian submits himself to Austrian laws, and his capacity should be determined by those laws.<sup>1</sup>

On appeal, the judgment was reversed, for the following reasons: The defendant had, as a Prussian, reached her majority on January 24, 1878; she then became capable of accepting a bill of exchange. She alleges that on her marriage with an Austrian this capacity ceased. It is true that she became an Austrian, but this fact could not deprive her of rights already acquired, and she should be considered as of age and capable at all times after January 24, 1878.

On appeal to the Supreme Court this judgment was confirmed.

<sup>1</sup> The text of the judgment is omitted.—ED.



## X. v. Y.

CIVIL TRIBUNAL OF THE SEINE. 1893.

[Reported 20 *Chunet*, 530.]

THE TRIBUNAL. The firm of X., ladies' tailors, delivered to Mrs. Y. between April and August, 1888, clothes and furnishings amounting to the sum of 404 francs. They brought suit for payment May 20, 1890.

The defendant, a Frenchwoman by origin, married at Paris in 1876 Y., an English merchant, then domiciled at P., and thereby became English. By the terms of their marriage contract the spouses adopted the system of community of goods, as established by the French Civil Code. Soon after the marriage, Y. moved his business and his residence to Paris. By a judgment of this Tribunal in 1889 a separation of goods was decreed between Mrs. Y. and her husband, and by a second judgment of May 6, 1890, they were divorced.

The plaintiffs claim, in the first place, that Mrs. Y. is liable to them in the action *de in rem verso*; or else by her personal undertaking made after the separation of goods to pay the debt in question; in the second place, that in any case Mrs. Y. being English should be bound by her national law, and might legally bind herself without her husband's consent by virtue of the English Act of August 18, 1882.

On the first point, there is no doubt that according to the French Civil Code Mrs. Y. would not be bound. So far as the action *de in rem verso* is concerned, the furnishings were made almost a year before the separation of goods, and therefore constituted a community debt, according to Articles 214 and 1409, § 5, of the Civil Code. Admitting that the defendant got the benefit of them, it was only as any married woman living with her husband with community of goods would get a benefit. The community, which Mrs. Y. gave up in 1889, would alone be bound. Regarding her personal undertaking to pay, by her card addressed to X. March 10, 1889, supposing the defendant wished to make a personal undertaking, the agreement was null for default of authority from her husband. By virtue of the principles laid down in Articles 217 and 1449 of the Civil Code, a wife after separation of goods can contract without her husband's authority only within the limits of a wise administration; and one could not claim that this contract would fall within such limits, since, in undertaking to pay a debt for which she was not bound, according to the principles of our law, Mrs. Y. would have done an act without consideration, a pure gratuity.

On the second point, it is generally agreed that foreigners in France are governed, so far as concerns their civil status and capacity, by their national law. If this principle is not expressly laid down in any text of the law, it follows by implication from Article 3 of the Civil Code, which assumes the principle of the preponderance of the national law as regards personal condition; and having imposed on foreigners

the French law in matters of police and safety, and with respect to their immovables, remains silent as to their status and their civil capacity. . . . By the terms of Articles 1 and 2 of the English Act of August 18, 1882, altering the law as to the property of married women, a married woman may contract as if she were sole, so as to bind her separate estate, and may be sued either in contract or in tort in all respects as if she were sole. Article 44 of the same Act provides that every contract made by a married woman so as to bind her separate estate will bind not only her separate estate at the date of the contract but all after-acquired estate.

To avoid the consequences of this law, Mrs. Y. urges (1) that the French jurisprudence applies to foreigners the rules of their statute personal only so far as the national law of the foreigners does not remit them, as to their status and capacity, to the law of the country where they are domiciled; and that in fact English law remits Englishmen to the law of their domicil: (2) that in adopting the French system of community she has renounced her national law, at least so far as her capacity is concerned, and the authority of her husband is therefore necessary.<sup>1</sup>

As to the first objection, the principle of Conflict of Laws that the defendant sets up as being the English law is not certain. In England, in fact, the Conflict of Laws is not the subject of positive statutory regulation, but depends on the "Common law," that is, on customary law, which is interpreted and moulded from day to day by jurisprudence. The English courts when dealing with conflicts between the English law and foreign laws in matters of status and personal capacity have a variable doctrine. Having allowed preponderance to the law of the act, they incline in fact to substitute for it in practice the law of the domicil; but this is no more than a present tendency of English jurisprudence toward a doctrine, a tendency which cannot be characterized as the law of England. But were this rule certain, we could not accept the remission by the foreign law to the law of the domicil. In deciding that the law applicable to the status and capacity of foreigners in France is their national law, the French legislator considers that since the status and capacity of persons are dependent strictly on their national characteristics, that law is better calculated than any other to appreciate the conditions whence the rule of law is derived; and that such law should be followed from high motives of reason and justice. But in adopting this principle, the legislator does not have in view the rule of international law in force in this case in the foreign system of law; since the French law itself, in the exercise of its sovereignty, establishes the rule, and solves the conflict of French law with foreign laws, providing that foreigners shall be governed while in France by their statute personal, and directing the French judges to apply to them their national law. This is an imperative rule, to which

<sup>1</sup> Part of the opinion, in which this second objection is held unfounded, is omitted. — Ed.

conformation has become necessary ; and we cannot substitute for it the different conception of a foreign system of law which attaches more importance in such a matter to the domicile than to the nationality. It follows that in this case the law applicable to the capacity of Mrs. Y. is the English Act of 1882, relative to the capacity of married women ; and by virtue of this law the defendant legally bound herself without her husband's authorization. . . .

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REYNAUD v. MARTEL.

COURT OF APPEAL OF GRENOBLE. 1892.

[*Reported 19 Clunet, 1143.*]

THE COURT. Peter Clapier was on June 18, 1891, condemned by the Court of Assizes of Gap to five years' imprisonment at hard labor for a rape. According to the provisions of article 29 of the Penal Code the condemned is under legal interdiction as long as his punishment lasts ; and Maître Martel, notary at Serres, has been appointed his guardian. This interdiction, which deprives the condemned of the use and administration of his property, is complementary to the principal punishment ; by the terms of the law, punishment at hard labor necessarily involves the accessorial punishment of legal interdiction.

By the terms of Art. 3 of the Civil Code, laws of police and safety bind all inhabitants of French territory ; Clapier, an Italian subject, but condemned in France for a crime committed on French territory, is bound by the French repressive laws. Although the laws which create the statute personal of foreigners govern them in France, this rule extends only to civil laws ; the safety of society requires that the criminal laws of France should bind all who inhabit French territory. Whatever the provisions of the Italian Code, Clapier, on his condemnation to five years' imprisonment with hard labor in France, is subject by the French penal code to the accessorial punishment of legal interdiction while the principal punishment lasts.

The interdicted individual cannot himself appear in the action for damages brought against him by Reynaud, his victim's father ; and the plaintiff has rightly brought the action against the guardian, Maître Martel, who is his legal representative.

## CUMMING v. CUMMING.

COURT OF APPEAL OF PARIS. 1895.

[Reported 23 *Clunet*, 147.]

THE Widow Cumming applied for a *conseil judiciaire* for her son William Cumming, by reason of his prodigality. The Tribunal of the Seine dismissed the application, and the plaintiff appealed.

THE COURT. As a result of the general principles of law and of the provisions of Art. 3 of the Civil Code,<sup>1</sup> foreigners living in France are governed by their national law in all that concerns their status and personal capacity. The rule that the statute personal follows the person is a rule of public order which binds French judges in the case of conflicts between different systems of law. It is not proved by any written law or by sufficiently trustworthy documents that according to the English law the status of persons domiciled abroad is governed not by the statute personal, but by the law of the domicile, to the exclusion of that of the allegiance; but even if such a rule exists, it could be applied, according to the evidence, only when the foreigner had definitively fixed his domicile in France *animo manendi*. Though Cumming established himself in business in France, it is not proved that he had abandoned the intention to return; he did not apply to be admitted to the enjoyment of civil rights, but on the contrary preserved and in all circumstances maintained his nationality of origin; he therefore remains subject to his national law in everything that concerns his personal status. The English law does not recognize the institution of the *conseil judiciaire*. Therefore, without going into the case on the merits, the court declares the Widow Cumming unable to maintain her application, and orders her to pay costs of the original application and of the appeal.

<sup>1</sup> "Laws of police and of safety bind all inhabitants of the territory. Immovables, even those in the possession of foreigners, are governed by the law of France. Laws concerning personal status and capacity bind Frenchmen, even while residing abroad." — ED.

## SECTION III.

## MARRIAGE.

## DALRYMPLE v. DALRYMPLE.

CONSISTORY COURT OF LONDON. 1811.

[Reported 2 Haggard Consistory, 54.]

THIS was a case of restitution of conjugal rights, brought by the wife against the husband, in which the chief point in discussion was, the validity of a Scotch marriage, *per verba de presenti*, and without religious celebration: one of the parties being an English gentleman, not otherwise resident in Scotland than as quartered with his regiment in that country.

SIR WILLIAM SCOTT.<sup>1</sup> The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition, for which the court has to acknowledge great obligations to the gentlemen, who have been examined in Scotland. It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland. . . .

The considerations that apply to the indiscretions of youth, to the habits of a military profession, and to the ignorance of the law of Scotland, arising from a foreign birth and education, are common to both, and I might say, to all systems of law. They are circumstances, which are not to be left entirely out of the consideration of the court, in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law, which, in both countries, allows the minor to marry, attributes to him, in a way which cannot be legally averred against, upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion. *quoad hoc*, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession exonerate a man from the

<sup>1</sup> Part of the opinion is omitted. — Ed.

general obligations of law. And with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge, and sense of the obligation, which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr. Dalrymple, though a minor, a soldier, and a foreigner, as effectively as it would do if he had been an adult, living in a civil capacity, and with an established domicile in that country.

The marriage, which is pleaded to be constituted, by virtue of some or all of the facts, of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a clandestine and irregular marriage. It is certainly a private transaction between the individuals, but it does not of course follow that it is to be considered as a clandestine transaction, in any ignominious meaning of the word; for it may be that the law of the country in which the transaction took place may contemplate private marriages with as much countenance and favor as it does the most public. It depends likewise entirely upon the law of the country whether it is justly to be styled an irregular marriage. In some countries one only form of contracting marriage is acknowledged, as in our own, with the exception of particular indulgences to persons of certain religious persuasions; saving those exceptions, all marriages not celebrated according to the prescribed form are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries, all modes of exchanging consent being equally legal, all marriages are on that account equally regular. In other countries, a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law, on account of the non-conformity to the order that is established. What is the law of Scotland upon this point? . . .

I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de presenti* does not require consummation in order to become "very matrimony;" that it does. *ipso facto et ipso jure*, constitute the relation of man and wife. . . . When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract.<sup>1</sup> . . .

<sup>1</sup> The court, upon examining the evidence, held that in this case a marriage had taken place according to the Scotch law. — Ed.

Little now remains for me but to pronounce the formal sentence of the court; . . . and I think I discharge that duty in pronouncing that Miss Gordon is the legal wife of John William Henry Dalrymple, Esq., and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this court that he has so done, by the first Session of the next Term.<sup>1</sup>

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IN RE LUM LIN YING.

UNITED STATES DISTRICT COURT (DISTRICT OF OREGON). 1894.

[Reported 59 Federal Reporter, 682.]

BELLINGER, J. It is admitted that the person claiming to be the husband of the petitioner is a merchant doing business in this city. Is the petitioner his wife? He testified that she was betrothed to him at two years of age, and that six months ago the marriage was solemnized according to the laws of China. He further testified that he had never seen his wife until her arrival here. Upon this last statement, I concluded to remand the petitioner, without further inquiry, but deferred to the urgent request of her attorneys to be heard as to this alleged China marriage, and as to the *bona fides* of the marriage transaction.

The only authority cited as to what constitutes the solemnization of marriage under Chinese laws is an article in the Encyclopedia Britannica by Prof. R. K. Douglas, professor of Chinese in King's College, London. According to this authority, marriage in China is an arrangement with which the parties most concerned have nothing to do. The duty of filial piety is said to be the final object of Chinese religious teaching, and, under its influence, parental will is a supreme authority, from which there is no appeal. Marriage, therefore, is not the result of acquaintanceship. "The bridegroom rarely sees his betrothed until she has become his wife." The preliminaries are entirely arranged by professional go-betweens with the parents and families of the respective parties. The correspondence between the two, thus conducted, is in writing, and is of the briefest character. If the arrangements proceed satisfactorily, the particulars of the engagement are committed to writing upon duplicate cards. These are sewn together, and the ceremony is complete. The bride journeys to the home of her husband, who may then see her for the first time. This is the system under which the marriage relied upon in this case is claimed to have taken place.

<sup>1</sup> Upon successive appeals, the Court of Arches and the Court of Delegates affirmed the sentence of the Consistory Court.

See, *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 395; *Brinkley v. A. G.*, 15 P. D. 76; *McDeed v. McDeed*, 67 Ill. 545; *Smith v. Smith*, 52, N. J. L. 207; *S. v. Patterson*, 2 Ire. 346; *Phillips v. Gregg*, 10 Watts, 158. — Ed.

and is consistent with such marriage. The fact that such a marriage did take place, as testified to by the parties, is not contradicted, and is consistent with all the circumstances appearing in the case.

If the parties were married according to the laws of China, such marriage is valid here. Parsons on Contracts says that "it seems to be generally admitted, and is certainly a doctrine of English and American law, that a marriage which is valid in the place where it is contracted is valid everywhere. The necessity and propriety of this rule are so obvious and so stringent that it can hardly be called in question." This rule is subject to the qualification that a marriage made elsewhere would not be acknowledged as valid in a State, the laws of which forbade it as incestuous. Meyer's Federal Decisions says the general rule is undoubtedly that a marriage good by the law of the place of solemnization is good everywhere.

At the time of the marriage in question in this case, the husband was domiciled in the United States. This raises a question, as to whether China is the place of solemnization of the marriage. While the place of solemnization governs, by what rule shall such place be determined, when the parties are at the time within different jurisdictions? It is doubtful whether this is a China marriage. It is not enough, in my judgment, that such a marriage is valid under the laws of China. I am of opinion that it must not only be valid under such laws, but, to be valid elsewhere, must have been solemnized within the jurisdiction of those laws.<sup>1</sup>

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### NORMAN v. NORMAN.

SUPREME COURT OF CALIFORNIA. 1898.

[*Reported 121 California, 620.*]

CHIPMAN, C. Action to have a certain marriage between plaintiff and defendant declared valid and binding upon the parties. A second amended complaint alleged that on August 2, 1897, defendant was a minor of the age of fifteen years and ten months, and that her father, one A. C. Thomson, was her natural and only guardian; plaintiff was of the age of twenty-one years and ten months, and that both plaintiff and defendant were citizens and residents of Los Angeles County, California; on said day plaintiff and defendant, at Long Beach, on the coast of California, boarded a certain fishing and pleasure schooner of seventeen tons burden, called the "J. Willey," duly licensed under the laws of the United States, of which W. L. Pierson was captain,

<sup>1</sup> Upon the evidence, the court held that the petitioner "does not belong to any class of persons within the exclusion acts of Congress," and therefore ordered her discharge, without deciding the question as to marriage. See *Rep. v. Li Shee*, 12 Hawaii, 329. — Ed.



and was enrolled as master thereof, and had full charge of said vessel; said vessel proceeded to a point on the high seas about nine miles from the nearest point from the boundary of the State and of the United States; the parties then and there agreed, in the presence of said Pierson, to become husband and wife, and the said Pierson performed the ceremony of marriage, and among other things they promised in his presence to take each other for husband and wife, and he pronounced them husband and wife; neither party had the consent of the father or mother or guardian of defendant to said marriage; on the same day and immediately after said ceremony the parties returned to the county of Los Angeles, and have ever since resided there, and they then and there immediately began to live and cohabit together as such husband and wife, and continued so to do until the tenth day of August, 1897; said marriage has never been dissolved; defendant denies the validity of said marriage and refuses to join in a declaration thereof.

Defendant, by her guardian *ad litem*, admits the allegations of the complaint, and alleges that in having the ceremony performed as alleged plaintiff and defendant did so with the intent and for the purpose of evading the statutes of the State prescribing the manner in which marriages shall be contracted and solemnized. She prays that the said pretended marriage be declared illegal and void, and that plaintiff be precluded and estopped from ever setting up or asserting or claiming to be the husband of defendant. The court found all the allegations of the complaint and answer to be true, and as conclusion of law found that plaintiff was not entitled to the relief claimed, but that the said pretended marriage was illegal and void, and judgment was entered accordingly.

The appeal is from the judgment. The action is brought under section 78 of the Civil Code. It must be conceded that the question presented by this appeal is one of much importance, whether viewed in its relation to society or to the parties only.

Appellant contends: 1. That the marriage is valid because performed upon the high seas; and 2. That it would have been valid if performed within this State, because there is no law expressly declaring it to be void. Respondent presents the case upon two propositions, claiming: 1. That no valid marriage can be contracted in this State except in compliance with the prescribed forms of the laws of this State; and 2. That citizens and domiciled residents cannot go upon the high seas for the avowed purpose of evading the law of this State, and contract a valid marriage.

Sections 722, 4082, and 4290 of the Revised Statutes of the United States are cited by appellant as recognizing marriages at sea and before foreign consuls, and that section 722 declares the common law as to marriage to be in force on the high seas on board American vessels. We have carefully examined the statutes referred to and do not find that they give the slightest support to appellant's claim.

The law of the sea, as it may relate to the marriage of citizens of the United States domiciled in California, cannot be referred to the common law of England any more than it can to the law of France or Spain or any other foreign country. We can find no law of Congress, and none has been pointed out by appellant, in which the general government has undertaken or assumed to legislate generally upon the subject of marriage on the sea. Nor, indeed, can we find in the grant of powers to the general government by the several States, as expressed in the national constitution, any provision by which Congress is empowered to declare what shall constitute a valid marriage between citizens of the several States upon the sea, either within or without the conventional three-mile limit of the shore of any State; and clearly does no such power rest in Congress to regulate marriages on land except in the District of Columbia and the territories of the United States, or where it possesses the power of exclusive jurisdiction. We must look elsewhere than to the Acts of Congress for the law governing the case in hand. Section 63 of the Civil Code provides as follows: "All marriages without this State, which would be valid by the laws of the country in which the same were contracted, are valid in this State." The parties in the present case were residents of and domiciled in this State and went upon the high seas to be married with the avowed purpose of evading our laws relating to marriage. It seems to be well settled that the motive in the minds of the parties will not change the operation of the rule. Chief Justice Gray, in *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, said: "A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the State shall have no validity here." This has been repeatedly affirmed by well-considered decisions. The authorities are found fully reviewed in that case, as they also will be found in support of the general rule in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, by the same learned jurist. See, also, as to marriages in evasion of the law of the domicile of the parties, *Bishop on Marriage and Divorce*, § 880 *et seq.* If the marriage in question can find support by the laws of any country having jurisdiction of the parties at the place where the marriage ceremony was performed, we should feel constrained by our code rule and well-considered decisions to declare it valid here, even though the parties were here domiciled at the time and went to the place where they attempted to be married for the purpose of evading our laws which they believed forbade the bans. But the parties did not go to any other State or country to be married. They went upon the high seas where no written law, of which we have any knowledge, existed by which marriage could be solemnized. The rule, therefore, that the law of the place must govern does not operate, because there was no law of the

place unless we may hold that the law of the domicile applies. The question presented is *res integra*, so far as we have been able to discover; and no case in England or the United States or elsewhere has been found by counsel (and their briefs disclose much research and industry) holding that the code rule *supra* applies to such a marriage as this. In the case of *Holmes v. Holmes*, 1 Abb. (U. S.) 525, the question was whether a marriage had been contracted under the laws of California or Oregon. It seems that the parties, who were domiciled in Oregon, met in San Francisco and there took passage on the steamer for Portland. It was at the trial suggested that the marriage might have taken place on board this vessel when on the high seas. There was no evidence that the parties ever met elsewhere except in California and Oregon. In the opinion by Deady, J., it was said, after showing that there was no valid marriage under the laws of either of these States: "Nor do I think that citizens of this State [Oregon], as the complainant and deceased were, can purposely go beyond its jurisdiction, and not within the jurisdiction of another State — as at sea — and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the State is subject and owes obedience, and ought not to be held valid by them." It is said by appellant that this expression of opinion is but dictum, inasmuch as the question did not necessarily arise. This may be true, but it commends itself to our judgment as wise and sound upon reason and principle. We find no case holding that parties domiciled in a State may, for the avowed purpose of evading its laws, go where no law exists and there consummate marriage in violation of the laws of their domicile, and immediately return and claim a valid marriage. In all the cases where the statutes have been thus circumvented it was accomplished by a marriage valid in the place where celebrated. The Gretna Green marriages of Scotland between citizens of England are notable examples, and they were upheld by the ecclesiastical courts. But these marriages were solemnized in accordance with the laws of Scotland, and therefore had legal sanction; and so also marriages in this country of citizens of one State going into another to avoid some disqualification prescribed in the law of their domicile.

It has been properly held that, as marriage is a natural right of which no government will allow its subjects, wherever abiding, to be deprived, if the parties happen to be sojourning in a foreign country, and under the local law there is no way by which they can enter into valid marriage, they may marry in their own forms and it will be recognized at home as good. Bishop on Marriage and Divorce, § 890 *et seq.* But this author says: "In reason, for we have probably no adjudications of the question, a marriage void by the law of the place of its celebration, in a case where such law provides no valid method, would not be made good by the rule we are considering if the parties went there simply to avoid compliance with the law of their domicile.

There was no necessity ; for their own law was open to them at home, and it would not assist them in eluding its inhibitions." And he refers to the case of *Holmes v. Holmes*, *supra*, remarking : " It would, perhaps, be the same also where the resort was, for the like purpose, to an uninhabited region of the high seas." In the case before us, the parties not only went where there was no law authorizing the marriage, but they went with the intention of immediately returning to their domicile where they supposed the law would not admit of their marriage, to enjoy the fruits of their contract. There was no necessity upon the parties to do this suddenly arising, or arising from unexpected surrounding circumstances, but the circumstances were of their own creation and for a purpose to evade the law of their home. There is, we conceive, no ground of expediency, sound policy, or good morals upon which the transaction can be given legal sanction. In summing up the doctrine Mr. Bishop says (Bishop on Marriage and Divorce, § 920): " Therefore the rule necessarily is, that whenever a marriage is entered into, so that the laws of one country take cognizance of it, it will be accepted as a marriage in every other country also ; on the other hand, no forms matrimonial which come short of constituting valid marriage in the one country will so bring it within the cognizance of international law as to make it valid elsewhere." We think it results from considerations of reason and principle that unless it appears that this marriage was consummated under some recognized law the courts of this State should not declare it valid ; and we think the burden is upon appellant to show such a law, failing in which his suit must fail. The authorities are many to the point that the party who relies upon the foreign law, or law of another State, must prove the law by its production. Stewart's Marriage and Divorce, § 119, cases cited.

Respondent cites the case of *Crapo v. Kelly*, 16 Wall. 610, where it was held that, in the case of an assignment in insolvency in the State of Massachusetts, it carried with it a vessel then in the Pacific Ocean ; and in an elaborate opinion it was shown that, except for the purposes and to the extent that certain attributes have been transferred to the United States by the several States of the Union, each possesses all the rights and powers of a sovereign State, and that the vessel in question was a part of the territory of the State of Massachusetts, although at the time in the Pacific Ocean, and that the laws of Massachusetts would govern the assignment. It is hence argued by respondent that the law of the domicile in the present case should govern. There is much force in this position, but we do not deem it necessary to place our decision on that ground. We think the law of the domicile of the parties must be the law by which to judge the validity or invalidity of this marriage upon the grounds already stated.

We are thus brought to the only remaining question : Was the marriage valid tested by the laws of California ?

If this marriage can be upheld, it must be upon the sole ground that

there was mutual consent, solemnization by a sea captain, and subsequent cohabitation as husband and wife for the space of eight days. What constituted marriage in this State, prior to the amendments of the code in 1895 and 1897, has been pretty well settled and need not be restated here. In the light of the history of past litigation, it ought not to be difficult to determine what is a valid marriage under existing law. Section 55 of the Civil Code, as amended in 1895, provided as follows: "Marriage is a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization authorized by this code." No particular form of solemnization is required, "but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife." Civ. Code, § 71.

Section 70 of the Civil Code provides as follows: "Marriage may be solemnized by either a justice of the Supreme Court, judge of the Superior Court, justice of the peace, priest, or minister of the gospel of any denomination." Prior to the amendment of 1895 the consent to marriage was required to be followed either by "a solemnization, *or by a mutual assumption of marital rights, duties, or obligations.*" Civ. Code, § 55. The amendment added the words "authorized by this code" after the word "solemnization" and struck out the words above in italics.

It seems to me that the intention of the legislature is plainly declared that consent must be followed by such solemnization as is authorized by the code or there can be no valid marriage; and that this solemnization can only be performed by the persons mentioned in section 70, *supra*, for no other persons are so authorized. Prior to 1895 section 75 of the Civil Code provided for marriages by declaration without the solemnization required by section 70, but the act of March 26, 1895, swept away that easy process of marriage. Section 68 of the Civil Code was also amended in 1895 in an important particular. It now reads: "Marriage must be licensed, solemnized, authenticated, and recorded as provided in this article; but noncompliance with its provisions *by other than the parties to a marriage* does not invalidate that marriage." The words in italics were added to the section as it formerly stood, and would seem to imply that, while there may be non-compliance with the law by parties other than those seeking marriage, there cannot be by the latter. Section 76 of the Civil Code now, as heretofore, makes provision for supplying the evidence of marriage where no record of the solemnization is known to exist; and a form of written declaration is prescribed. A new section, 79½, was added to the Civil Code in 1897, which provides that "the provisions of this chapter, so far as they relate to procuring licenses and the solemnizing of marriage, are not applicable to members of any particular religious denomination having, as such, any peculiar mode of entering the marriage relation." . . . Section 69 of the Civil Code provides that:

“All persons about to be joined in marriage must first obtain a license therefor from the county clerk.” . . . In this case there was no license, there was no solemnization by any person authorized by law to perform the ceremony, there was no marriage under section 79½. To recognize such a marriage we think would grossly violate the spirit and letter of our statute and be a blot upon the civilization we profess. To give the law any just interpretation we must hold that, subject to the exception mentioned in section 79½, section 55 requires not only the consent of parties capable of making a contract of marriage, but that that consent must be followed by a solemnization authorized by the code, and this solemnization can only be performed by the persons named in section 70. We do not think it necessary to decide whether it is mandatory to obtain a license; nor whether the minority of the defendant and want of consent of her parents or guardian would invalidate the marriage. Our conclusion rests upon the want of any authorized solemnization and would be the same if the parties were both of full age. We recommend that the judgment be affirmed.<sup>1</sup>

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### SIMONIN *v.* MALLAC.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. 1860.

[*Reported 29 Law Journal, Probate, 97.2*]

THIS was a petition by Valérie Josephine Wilhelmine Simonin (falsely called Mallac), for a decree of nullity of marriage. The petitioner, a Frenchwoman, was living, in 1853, in Paris with her mother; she became acquainted with Léon Mallac, a Frenchman, who made an offer of marriage, which she accepted. In 1854 the parties came to London and were there married in due form. Léon Mallac was then of the age of twenty-nine years, and the petitioner twenty-two. The consent of Mallac's father had not been obtained. The marriage was not consummated, and the parties returned to Paris. Mallac afterwards refused to marry the petitioner in France. She then instituted before the Civil Tribunal of the Seine a suit to procure a decree of nullity of the pretended marriage. On December 1, 1854, a decree was made, of which the following is the substance.

A marriage abroad between French subjects must be preceded by publication in France, according to Article 63 of the Code Napoléon; and the provisions of Articles 144 and following must be complied with. If these formalities are omitted with the express intention of evading the law the marriage is to be pronounced null. The marriage

<sup>1</sup> See *Kent v. Burgess*, 11 Sim. 361; *R. v. Brompton*, 10 East, 282; *Culling v. Culling* [1896], Prob. 116; *Davis v. Davis*, 1 Abb. N. C. 140; *Phillips v. Gregg*, 10 Watts, 158. — ED.

<sup>2</sup> 2 Sw. and Tr. 67, s. c. — ED.

in question was celebrated without the parties having obtained or sought the consent of their parents, and without having been preceded in France by the prescribed publication. The parties went to England only for the moment, and returned to France directly after the ceremony; and they acted thus with the formal intention of evading the prescriptions of the French law. The marriage has not been consummated. On these grounds the Tribunal declares the pretended marriage null.

The important provisions of the Code Napoléon (Articles 148, 151-154, 183) are as follows.

No man under twenty-five and no woman under twenty-one can contract a valid marriage without the parents' consent. Persons who have passed these ages respectively must before marrying ask advice of their parents by an *acte respectueux et formel*. If the man is under thirty or the woman under twenty-five, this *acte* must be repeated each month for three months; and at the end of the fourth month the marriage may take place. If the parties are above these ages respectively the *acte* need not be repeated, and the marriage may take place at the end of a month. Parents whose consent has not been asked cannot impeach a marriage after they have expressly or tacitly approved it, or after a year has passed since they knew of it. A party to the marriage cannot impeach it if a year has passed since he reached the age of full consent.

The petitioner came to England in 1857 and has since that time resided here with no intention to return to France.<sup>1</sup>

*Dr. Phillimore* and *Dr. Stabey*, for the petitioner. We contend that the incapacity to contract a marriage follows the individual everywhere as a *qualitas personæ*: and this view is upheld by a most important decision recently pronounced on the subject.

[THE JUDGE ORDINARY. — The application of *Brook v. Brook* to this case is, that the marriage is void in France, not that it is void in England. KEATING, J. — *Brook v. Brook* does not decide that the marriage in question was bad at Altona. The JUDGE ORDINARY. — Could a foreigner, by the laws of his own country a minor till twenty-five, plead in infancy here to a bond executed at twenty-two?]

I apprehend not.

[THE JUDGE ORDINARY. — Then, could a foreigner, capable of marrying by his municipal law, but incapable by ours, contract a valid marriage here?]

SIR CRESSWELL CRESSWELL, JUDGE ORDINARY. This state of facts presented two very important questions for our consideration: first, whether this court has any jurisdiction over Léon Mallac, the party cited; and, secondly, assuming that such jurisdiction exists, whether, according to the law of this country, the marriage solemnized is to be held null and void. We had the advantage of a learned argument

<sup>1</sup> This statement of facts is condensed from that of the Reporter. Part of the argument of counsel is omitted. — Ed.

on behalf of the petitioner, and feel that the responsibility cast upon the court is greatly increased by the want of any such assistance on the other side. The argument in favor of the jurisdiction of the court was rested on the ground, first, that the contract was made in England, and that the court is called upon for its decision with regard to the effect of a civil and religious English contract, celebrated under an English statute (4 Geo. IV. c. 76), and that the tribunals *loci contractus* have, generally speaking, cognizance of the contract; secondly, that England is now the domicile of the petitioner, but that assertion begs the main question in dispute, for if the marriage be valid it is not her domicile; thirdly, that the respondent was personally served with the citation and petition, and has not appeared to contest the jurisdiction of the court. The 42d section of the statute 20 & 21 Vict. c. 85, by which this court was established, removes all objection on the ground of the citation having been served without Her Majesty's dominions, but, in our opinion, would not of itself suffice to give to the court authority to decide upon the rights of a party not otherwise subject to its jurisdiction. This question, therefore, depends upon the first proposition, that the parties by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal. Huber, 65. tit. 1, De Foro Competente, § 5, says, "Sequitur causa fori tertia quam rem gestam esse diximus eamque vel e contractu vel ex delicto admisso." In another place he adds, "Si reus illic haberi posset"; and the same doctrine is to be found in John Voet, Boullenois, Donellus, and Story. The Common Law Procedure Act (15 & 16 Vict. c. 76), § 19, which allows a writ of summons to be issued against a person residing out of the jurisdiction, and not being a British subject, and proceedings to be had thereon, notice of such writ having been served on the party, appears to have been founded on this principle; and section 42 of the 20 & 21 Vict. c. 85, already adverted to, removes all difficulty as to service of process, although the party cited is a foreigner by origin and domicile. There is nothing contrary to natural justice in calling upon him to have the validity or invalidity of a supposed contract ascertained and determined by the tribunal of the country where it was entered into by him; for, according to Lord Stowell, in *Dalrymple v. Dalrymple*, 2 Hag. Cons. 61, "It is an indisputable rule of law, as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country; if he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party." We think, therefore, that this court is competent to entertain the present suit, and to adjudicate upon the petition presented by the party calling herself Valerie Simonin, which prays the court to decree that the pretended form or ceremony of marriage had between the petitioner and Léon Mallac was and is



void and of no effect in law whatsoever. This, which is the second question to be determined, is, no doubt, of the gravest importance, and, as far as this court has been able to ascertain, *primæ impressionis*. No decision on the point was cited to us by the learned advocate for the petitioner, and we have not had the benefit of any other diligence save our own, in the attempt to discover precedents for our guidance. The question is this, — Whether a marriage duly solemnized in England, in the manner prescribed by the law of England, between parties of full age and capable of contracting according to that law, is to be held null and void, because the parties to that marriage being foreigners contracted it in England in order to evade the laws of the country to which they belonged, and in which they were domiciled? It may, indeed, be doubted whether the evidence of the petitioner established the intention to evade the law of France, and whether that which the witness Auguste Noël called a Statute of Limitations, viz., section 183 of the Code Napoléon, did or did not operate to bar the right of the petitioner to institute this proceeding four years after the marriage was solemnized. But we pass over those points in order to deal with the broad and important question that has been raised. It was contended that the parties being French, the law of that country affixed to them an incapacity to contract marriage without attending to the formalities prescribed, and that such incapacity was a personal status which travelled with them everywhere, and rendered them incapable of making a valid contract in any other country. But, according to the evidence, such incapacity to contract was not absolute, but conditional only; and a contract made by them would be good unless they came here with the intention to evade the law of France. So, a contract made here would be unimpeachable if ratified by the subsequent assent of the parents, and a contract made here would be perfectly valid, unless impeached within a certain time; and, therefore, a marriage contracted between a man and woman of the respective ages of twenty-five and twenty-one, without attending to the formalities prescribed by the Code Napoléon, 151, 152, 153, and 154, may receive a different consideration from one absolutely prohibited by Article 148, by parties respectively under those ages. But taking the decree of the French court in the suit there instituted as evidence that, by the law of France, this marriage was void, we again come to the broad question, — is it to be judged of here by the law of England, or the law of France? In general, the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such rule does not extend to contracts of marriage, but that parties are, with reference to them, bound by the law of their domicile. This question, of so much importance in all civilized communities, has been largely discussed by jurists of all nations; but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it

is brought in dispute, and of which the parties were domiciled subjects. That a marriage, good by the law of the country where solemnized, should be held good in all other countries, and the converse, is strongly maintained, as a general rule, by nearly all writers on international law. But, according to the same authorities, it is subject to some few exceptions, viz., marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy, *e. g.*, by our Royal Marriage Act. Story, in his Conflict of Laws, § 113, a, mentions, as a third exception, "Those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country." In several instances, learned judges presiding in our ecclesiastical courts have stated the general rule without mentioning the exceptions, whence it has sometimes been contended that they meant to controvert their existence. But inasmuch as none of the cases referred to fell within the exceptions above mentioned, it cannot justly be inferred that those learned persons intended their words to bear so extensive a meaning; for they would hardly have repudiated the doctrine of several learned writers, whose works are always received as worthy of great attention, without condescending to advert to it in terms, and assigning some reasons for dissenting from it. In addition to the writings of jurists as to the existence of such a general rule, by the law of all civilized nations, we find that in several cases it has been adopted by the courts of this country as the ground of their decisions.

I believe the earliest of them was *Scrimshire v. Scrimshire*, decided by Sir E. Simpson in 1752, and reported 2 Hag. Cons. 395; for that learned judge then said it was a case of *primæ impressionis*. The judgment is of great value, from the full manner in which he dealt with the principles on which the court should proceed in adjudicating upon such cases. The parties were British subjects domiciled in England. It was a suit for restitution of conjugal rights. The respondent pleaded that the marriage was celebrated in France; set forth circumstances under which that celebration took place, and averred that, by the laws of France, the marriage was null and void. Sir E. Simpson, after disposing of one or two preliminary points, observed: "The general questions are two: first, whether there be full and legal proof that the parties did mutually, freely, and voluntarily celebrate marriage in such manner as the laws of this country would deem to constitute marriage, if there was nothing else in the case but a question on the fact of the marriage. Secondly, whether, if the fact of the marriage should be proved, this marriage can, by the laws of this country, be effectuated and pronounced to be good, being solemnized in France, where by law it is null and void to all intents and purposes? For it seemed to be admitted in the argument that the law was so, but insisted that it ought not to be a rule of determination in this cause." The first point he determined in the affirmative, and would have held the marriage valid had it been agreeable to the laws of France, where it was cele-

brated. "But," he proceeds, "the great difficulty arises on the second question, from the marriage being celebrated in France, where such marriage is null by the law of France." He afterwards says, "The only question before me is, whether this is a good or bad marriage by the laws of England, and I am inclined to think that it is not good. On this point, I apprehend it is the law of this country to take notice of the laws of France or any foreign country, in determining upon marriages of this kind. The question being in substance this, whether, by the law of this country, marriage contracts are not to be deemed good or bad according to the laws of the country in which they are formed, and whether they are not to be construed according to that law." He then quoted several passages from Sanchez, J. Voet, and others, showing that if subjects of a country where clandestine marriages are prohibited go to another country, where there is no such prohibition, and celebrate a clandestine marriage there, it is to be held good; and the converse is established by the same authorities. He sums up the effect of the books referred to in these words: "These authorities fully show that all contracts are to be considered according to the laws of the country where they are made. And the practice of civilized countries has been conformable to this doctrine, and, by the common consent of nations, has been so received." In many instances, judges have used similar language with reference to cases where the form and ceremonial of the marriage were alone in question; and it can hardly, in such cases, be presumed that they intended their words to bear a more extensive sense than was necessary for the question then before them; but the sense ascribed by Sir E. Simpson to these passages extends to the clandestine character of the marriage, and not merely to the form of the contract or ceremonial. He then explains in the clearest manner the principle on which courts have proceeded in holding that marriages are to be considered according to the law of the country in which they are celebrated: "All nations allow marriage contracts; they are *juris gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion which must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not according to the laws of the country where they are made. It is of equal consequence to all that one rule in these cases should be observed by all countries — that is, the law where the contract is made. By observing this law, no inconvenience can arise; but infinite mischief will ensue if it is not." The same rule was recognized and made the ground of the judgment of Sir W. Wynne in *Middleton v. Janverin*, 2 Hag. Cons. 437; nor is their reasoning weakened by the fact that certain exceptions out of that rule have been generally recognized,

viz., where marriages deemed contrary to the law of religion and morality, and contrary to the settled policy of a nation, have been contracted abroad, and held void in the country of which the parties were domiciled subjects, and where such a marriage would not be allowed. It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of the country where a marriage has been solemnized in conformity with the laws of that country should hold it void, because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed. No such argument has been advanced, even in the case of marriages deemed to be incestuous. There is a passage in Huber, *Prælectiones Juris Civilis*, lib. 1, tit. 3, ‘*De Conflictu Legum*,’ on this subject which ought to be noticed. After discussing contracts made in foreign countries, in section 8 he proceeds: “*Matrimonium pertinet etiam ad has regulas si licitum est eo loco ubi contractum et celebratum est ubique validum erit effectumque habebit sub eâdem exceptione prejudicii aliis non creandi; cui licet addere si exempli nimis sit abominandi ut si incestum juris gentium in secundo gradu contingerit alicubi esse permissum quod vix est ut usu venire possit.*” And he proceeds to say, that if parties go to a country where such a marriage is tolerated, and celebrate it there, and return to their own country, it will not be recognized: “*Quia sic jus nostrum pessimis exemplis eluderetur eoque pertinet hæc observatio. Sæpe fit ut adolescentes sub curatoribus agentes furtivos amores nuptiis conglutinare cupientes abeant in Frisiam Orientalem aliave loca in quibus curatorum consensus ad matrimonium non requiritur juxta leges Romanas, quæ apud nos hæc parte cessant, celebrant ibi matrimonium et mox redeunt in patriam. Ego ita existimo hanc rem manifesto pertinere ad eversionem juris nostri; ac ideo non esse magistratus hic obligatos e jure gentium ejusmodi nuptias agnoscere et ratas habere. Multoque magis statuendum est eos contra jus gentium facere videri qui civibus alieni imperii suâ facilitate jus patrii legibus contrarium scientes volentes impertiunt.*”

Now this passage is remarkable. Huber discusses the two exceptions out of the general rule that marriages good where celebrated, are, by the law of nations, to be acknowledged everywhere, incestuous marriages and marriages of minors without consent *curatorum*, celebrated in countries whither they have gone for the purpose of evading the laws of the country of their domicil; and he does not suggest the slightest doubt as to either class being held good in the country where solemnized; but, with reference to the second class, vindicates the country of the domicil against the charge of violating the law of nations by refusing to recognize them. Story is, I believe, the only writer who has expressed an opinion on this point; and he, after mentioning that France has ventured on the doctrine that the marriages of Frenchmen under such circumstances shall not be deemed valid, adds, “There can

be little doubt that foreign countries where such marriages are celebrated, will follow their own law, and disregard that of France." Conflict of Laws, § 90. The question appears to have occurred to Lord Meadowbank, a judge of great eminence; for in the note of his opinion annexed to his interlocutor of remit, in the case of *Gordon v. Nye*, Ferg. Cons. Rep. 361, he puts this question, "Or would a marriage here be declared void because the parties were domiciled in England, and minors when they married here, and, of course, incapable by the law of that country of contracting marriage?" — plainly intimating his own opinion that they would not. In this country marriages have been solemnly recognized as valid, although celebrated in Scotland between English domiciled minors, without the consent required by the Marriage Act, 26 Geo. II., to which country they had resorted for the purpose of evading the operation of that act. I allude to the case of *Compton v. Bearcroft*. In a note to the report of *Middleton v. Janverin*, 2 Hag. Cons. 444, the libel in that case is set out, in which "the minority of the lady, the want of consent, the English domicile, and the Marriage Act were pleaded, and it was alleged that the parties were married in Dumfries merely to evade the laws of this country, and returned to England the same day." The prayer was, that the marriage might be declared null and void, pursuant to the said act for clandestine marriages. The libel was rejected. The court, therefore, must have held, that if all the matters alleged were proved they would not supply a ground for declaring the marriage null.

It has been said that the parties did not in that case evade the Marriage Act, for that it contains an express exception of marriages solemnized in Scotland. It is true that marriages of minors in Scotland, without consent, are not prohibited by the Marriage Act, and therefore they cannot be said to be contrary to the law of England. But there can be no doubt that the parties went to Scotland to evade the operation of the law which was established in England. *Compton v. Bearcroft* is, therefore, an authority to this extent, that a marriage contracted by English domiciled subjects abroad, where it is not prohibited by English law, will not be held bad because the parties have gone thither to evade the necessity of complying with certain conditions that would have been imposed upon them in England. The French tribunal in this case appears to have held the marriage null and void, not because it was absolutely prohibited by the law of France, but because the parties contracted it in England with the formal intention of evading the prescriptions of the French law.

Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions their own nation only must bear the blame. But what right has one independent nation to call upon any other nation, equally independent, to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any

such right it must be found in the law of nations, that law "to which all nations have consented or to which they must be presumed to consent, for the common benefit and advantage." Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now, the law of France is equally stringent whether both parties are French, or one only. Assume, then, that a French subject comes to England, and there marries without consent a subject of another foreign country, by the laws of which such a marriage would be valid, — which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not, then, be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know, and to agree to be bound by? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law? But it may be said that, in the case now before the court, both parties are French, and therefore no such difficulty can arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognized, it must be followed out to all its consequences. The cases put are, therefore, a fair test as to the possibility of maintaining that, by any *comitas* or *jus gentium*, this court is bound to adopt the law of France as its guide. Huber, indeed, in the passage cited, after vindicating the refusal to acknowledge a marriage solemnized abroad between parties who have gone there to evade the law of their own country, proceeds: "Multoque magis statuendum est eos contra jus gentium facere videri qui civibus alieni imperii suâ facilitate jus patriis legibus contrarium *scientes volentes* impertiuntur."

It is somewhat difficult to ascertain what Huber would require to be done by foreigners in order that they may be exempted from his reproach. He assumes that they are *scientes*. Is it intended that they are to inquire and ascertain whether the law of any foreign nation will be evaded if the proposed marriage is solemnized? Is the domicile of the parties and the law prevailing there to be investigated? Are the parties to be called upon to prove their ages, consent of certain relations or the non-existence of such relations, or that they have not come to this country to evade the laws of their own? Are the clergy of this country to be deemed *scientes* that a foreign law is about to be evaded, unless they have proof to the contrary? Unless that proposition can be established the reproach of violating the law of nations cannot attach to this country if such marriages are here celebrated. The great importance of having some one certain rule applicable to all cases — the difficulty, not to say impossibility, of

having any rule applicable to all cases, save that the law of the country where the marriage is solemnized, shall, in that country at least, decide whether it is valid or invalid—the absence of any judicial decision or dictum, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects.

France may make laws for her own subjects, and impose on them all the consequences, good or evil, that result from those laws; but England also may make laws for the regulation of all matters within her own territory. Either nation may refuse to surrender its own laws to those of the other, and if either is guilty of any breach of the *comitas* or *jus gentium*, that reproach should attach to the nation whose laws are least calculated to insure the common benefit and advantage of all. For these reasons we feel bound to dismiss this petition.

It may be unfortunate for the petitioner that she should be held to be a wife in England and not so in France. If she had remained in her own country she might have enjoyed there the freedom conferred upon her by a French tribunal; having elected England as her residence, she must be contented to take English law as she finds it, and to be treated as bound by the contract which she there made. The novelty and importance of the question has cast upon the court much anxiety; but from some portion of it we are relieved by the consideration that if our judgment is wrong it may be corrected by the highest tribunal in this country. *Petition dismissed.*<sup>1</sup>

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BROOK v. BROOK.

HOUSE OF LORDS. 1861.

[*Reported 9 House of Lords Cases, 193.*]

WILLIAM LEIGH BROOK, of Meltham Hall, in the county of York, married in May, 1840, at the parish church of Huddersfield, in Yorkshire, Charlotte Armitage. There were two children of that marriage, Clara Jane Brook and James William Brook. In October, 1847, Mrs. Brook died. On the 7th June, 1850, William Leigh Brook was duly, according to the laws of Denmark, married at the Lutheran church at Wandsbeck, near Altona, in Denmark, to Emily Armitage, the lawful sister of his deceased wife. At the time of this Danish marriage, Mr Brook and Miss Emily Armitage were lawfully domiciled in England, and had merely gone over to Denmark on a temporary visit. There were three children of this union, Charles Armitage Brook, Charlotte Amelia Brook, and Sarah Helen Brook. On the 17th September, 1855,

<sup>1</sup> *See C. v. Graham, 157 Mass. 73. — Ed.*

Mrs. Emily, the second wife of Mr. Brook, died at Frankfort of cholera, and two days afterwards Mr. Brook himself died of the same complaint at Cologne, leaving all the five children him surviving.

Mr. Brook, in the early part of the day on which he died, executed a will by which he disposed of his property among his five children, and appointed his brother Charles Brook, and his two brothers-in-law, John and Edward Armitage, his executors and trustees. In consequence of the state of his property and of some pending purchases of land, and afterwards on account of the death of the infant Charles Armitage Brook, it became necessary to institute an administration suit, and a bill was filed for this purpose in March, 1856, which by order of the court was amended, and in July, 1856, a supplemental bill was filed, making the Attorney-General a party to the suit.

The causes came on to be heard in March, 1857, before Vice-Chancellor Stuart, when certain inquiries were ordered, and in June, 1857, the chief clerk certified (among others) the facts above stated, and the certificate raised the question of the validity of the marriage at Wandsbeck. Evidence was taken on this subject, and several declarations were made by officials and by advocates in Holstein, that the marriage of a widower with the sister of his deceased wife was perfectly lawful and valid in Denmark to all intents and purposes whatever.

The cause coming on for hearing, on further directions, Vice-Chancellor Stuart called in the assistance of Mr. Justice Creswell, who, on the 4th December, 1857, declared his opinion that the marriage at Wandsbeck was by the law of England invalid. Vice-Chancellor Stuart on the 17th April, 1858, pronounced judgment, fully adopting this opinion, and decreed accordingly. This appeal was then brought.<sup>1</sup>

LORD CAMPBELL, LORD CHANCELLOR. My Lords, the question which your Lordships are called upon to consider upon the present appeal is, whether the marriage celebrated on the 9th June, 1850, in the duchy of Holstein, in the kingdom of Denmark, between William Leigh Brook, a widower, and Emily Armitage, the sister of his deceased wife, they being British subjects then domiciled in England, and contemplating England as their place of matrimonial residence, is to be considered valid in England, marriage between a widower and the sister of his deceased wife being permitted by the law of Denmark?

I am of opinion that this depends upon the question whether such a marriage would have been held illegal, and might have been set aside in a suit commenced in England in the lifetime of the parties before the passing of statute 5 & 6 Wm. IV. c. 54, commonly called Lord Lyndhurst's Act.

I quite agree with what was said by my noble and learned friend during the argument on the Sussex peerage, that this act was not

<sup>1</sup> Arguments of counsel are omitted. — Ed.



brought in to prohibit a man from marrying his former wife's sister, and that it does not render any marriage illegal in England which was not illegal before. The object of the second section was to remedy a defect in our procedure, according to which marriages illegal, as being within the prohibited degrees either of affinity or consanguinity, however contrary to law, human and divine, and however shocking to the universal feelings of Christians, could not be questioned after the death of either party. But no marriage that was before lawful was prohibited by the act; and I am of opinion that no marriage can now be considered void under it, which, before the act, might not, in the lifetime of the parties, have been avoided and set aside as illegal.

There can be no doubt that before Lord Lyndhurst's Act passed, a marriage between a widower and the sister of a deceased wife, if celebrated in England, was unlawful, and in the lifetime of the parties could have been annulled. Such a marriage was expressly prohibited by the Legislature of this country, and was prohibited expressly on the ground that it was "contrary to God's law." Sitting here, judicially, we are not at liberty to consider whether such a marriage is or is not "contrary to God's law," nor whether it is expedient or inexpedient.

Before the Reformation the degrees of relationship by consanguinity and affinity, within which marriage was forbidden, were almost indefinitely multiplied; but the prohibition might have been dispensed with by the Pope, or those who represented him. At the Reformation, the prohibited degrees were confined within the limits supposed to be expressly defined by Holy Scripture, and all dispensations were abolished. The prohibited degrees were those within which intercourse between the sexes was supposed to be forbidden as incestuous, and no distinction was made between relationship by blood or by affinity. The marriage of a man with a sister of his deceased wife is expressly within this category. *Hill v. Good*, Vaugh. 302, and *Reg. v. Chadwick*, 11 Q. B. 173, 205, are solemn decisions that such a marriage was illegal; and if celebrated in England such a marriage unquestionably would now be void.

Indeed, this is not denied on the part of the appellants. They rest their case entirely upon the fact that the marriage was celebrated in a foreign country, where the marriage of a man with the sister of his deceased wife is permitted.

There can be no doubt of the general rule, that "a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere." But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law

of the country of domicil, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicil, and it is declared void by that law, it is to be regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated.

This qualification upon the rule that "a marriage valid where celebrated is good everywhere," is to be found in the writings of many eminent jurists who have discussed the subject.

I will give one quotation from Huberus de Conflictu Legum, bk. 1, tit. 3, § 2: "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*" Then he gives "marriage" as the illustration: "*Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione, præjudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit.*" Id. § 8. The same great jurist observes: "*Non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt.*" Id. § 10.

Mr. Justice Story, in his valuable treatise on the Conflict of Laws, while he admits it to be the "rule that a marriage valid where celebrated is good everywhere," says, § 113 *a*, there are exceptions; those of marriages involving polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country, he adds, § 114, "in respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognize polygamy or incestuous marriages; but when we speak of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous." The conclusion of this sentence was strongly relied upon by Sir Fitz-Roy Kelly, who alleged that many in England approve of marriage between a widower and the sister of his deceased wife; and that such marriages are permitted in Protestant States on the Continent of Europe and in most of the States in America.

Sitting here as a judge to declare and enforce the law of England as fixed by King, Lords, and Commons, the supreme power of this realm, I do not feel myself at liberty to form any private opinion of my own on the subject, or to inquire into what may be the opinion

of the majority of my fellow-citizens at home, or to try to find out the opinion of all Christendom. I can as a judge only look to what was the solemnly pronounced opinion of the legislature when the laws were passed which I am called upon to interpret. What means am I to resort to for the purpose of ascertaining the opinions of foreign nations? Is my interpretation of these laws to vary with the variation of opinion in foreign countries? Change of opinion on any great question, at home or abroad, may be a good reason for the legislature changing the law, but can be no reason for judges to vary their interpretation of the law.

Indeed, as Story allows marriages positively prohibited by the public law of a country, from motives of policy, to form an exception to the general rule as to the validity of marriage, he could hardly mean his qualification to apply to a country like England, in which the limits of marriages to be considered incestuous are exactly defined by public law.

That the Parliament of England in framing the prohibited degrees within which marriages were forbidden, believed and intimated the opinion that all such marriages were incestuous and contrary to God's word I cannot doubt. All the degrees prohibited are brought into one category, and although marriages within those degrees may be more or less revolting, they are placed on the same footing, and before English tribunals, till the law is altered, they are to be treated alike.

An attempt has been made to prove that a marriage between a man and the sister of his deceased wife is declared by Lord Lyndhurst's Act to be no longer incestuous. But the enactment relied upon applies equally to all marriages within the prohibited degrees of affinity, and on the same reasoning would give validity to a marriage between a step-father and his step-daughter, or a step-son and his step-mother, which would be little less revolting than a marriage between parties nearly related by blood.

The general principles of jurisprudence which I have expounded have uniformly been acted upon by English tribunals. Thus, in the great case of *Hill v. Good*, Vaugh. 302, Lord Chief Justice Vaughan and his brother judges of the Court of Common Pleas, held, that "When an Act of Parliament declares a marriage to be against God's law, it must be admitted in all courts and proceedings of the kingdom to be so."

In *Harford v. Morris*, 2 Hagg. Cons. 423, 434, the great judge who presided clearly indicates his opinion that marriages celebrated abroad are only to be held valid in England, if they are according to the law of the country where they are celebrated, and if they are not contrary to the law of England. He adds: "I do not say that foreign laws cannot be received in this court in cases where the courts of that country had a jurisdiction. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation upon the court to determine by those foreign laws."

I will only give another example, the case of *Warrender v. Warrender*, 2 Clark & F. 488, in which I had the honor to be counsel at your Lordships' bar. Sir George Warrender, born and domiciled in Scotland, married an Englishwoman in England according to the rites and ceremonies of the Church of England; but instead of changing his domicile, he meant that his matrimonial residence should be in Scotland, where he had large landed estates, on which his wife's jointure was charged. Having lived a short time in Scotland, they separated. Sir George, continuing domiciled in Scotland, commenced a suit against her in the Court of Session for a dissolution of the marriage on the ground of adultery alleged to have been committed by her on the continent of Europe. It was objected that this being a marriage celebrated in England, a country in which by the then existing law, marriage was indissoluble, the Scotch court had no jurisdiction to dissolve the marriage, and Lolly's case was relied upon. in which a domiciled Englishman having been married in England, and while still domiciled in England, having been divorced by decree of the Court of Session in Scotland, and having afterwards married a second wife in England, his first wife being still alive, he was convicted of bigamy in England, and held by all the judges to have been rightly convicted, because the sentence of the Scotch court dissolving his first marriage was a nullity. But your Lordships unanimously held that as Sir George Warrender at the time of his marriage was a domiciled Scotchman, and Scotland was to be the conjugal residence of the married couple, although the law of England where the marriage was celebrated regulated the ceremonials of entering into the contract, the essentials of the contract were to be regulated by the law of Scotland, in which the husband was domiciled, and that although by the law of England marriage was indissoluble, yet as by the law of Scotland the tie of marriage might be judicially dissolved for the adultery of the wife, the suit was properly constituted, and the Court of Session had authority to dissolve the marriage.

It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.

A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so even if they were native-born English subjects, who had abandoned their English domicile, and were domiciled in Denmark. But I am by no means prepared to say that the marriage now in question ought to be, or would be, held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of

God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.

Sir FitzRoy Kelly argued that we could not hold this marriage to be invalid without being prepared to nullify the marriages of Danish subjects who contracted such a marriage in Denmark while domiciled in their native country, if they should come to reside in England. But on the principles which I have laid down, such marriages, if examined, would be held valid in all English courts, as they are according to the law of the country in which the parties were domiciled when the marriages were celebrated.

I may here mention another argument of the same sort brought forward by Sir FitzRoy Kelly, that our courts have no jurisdiction to examine the validity of marriages celebrated abroad according to the law of the country of celebration, because, as he says, the Ecclesiastical Courts, which had exclusive jurisdiction over marriage, must have treated them as valid. But I do not see anything to have prevented the Ecclesiastical Court from examining and deciding this question. Suppose in a probate suit the validity of a marriage had been denied, its validity must have been determined by the Ecclesiastical Court, according to the established principles of jurisprudence, whether it was celebrated at home or abroad.

Sir FitzRoy Kelly further argued with great force, that both Sir Cresswell Cresswell and Vice-Chancellor Stuart have laid down that Lord Lyndhurst's Act binds all English subjects wherever they may be, and prevents the relation of husband and wife from subsisting between any subjects of the realm of England within the prohibited degrees. I am bound to say that in my opinion this is incorrect, and that Lord Lyndhurst's Act would not affect the law of marriage in any conquered colony in which a different law of marriage prevailed, whatever effect it might have in any other colony. I again repeat that it was not meant by Lord Lyndhurst's Act to introduce any new prohibition of marriage in any part of the world. For this reason, I do not rely on the Sussex Peerage Case as an authority in point, although much reliance has been placed upon it; my opinion in this case does not rest on the notion of any personal incapacity to contract such a marriage being impressed by Lord Lyndhurst's Act on all Englishmen, and carried about with them all over the world; but on the ground of the marriage being prohibited in England as "contrary to God's Law."

I will now examine the authorities relied upon by the counsel for the appellants. They bring forward nothing from the writings of jurists except the general rule, that contracts are to be construed according to the *lex loci contractus*, and the saying of Story with regard to a marriage being contrary to the precepts of the Christian religion, upon which I have already commented.

But there are various decisions which they bring forward as conclusive in their favor. They begin with *Compton v. Bearcroft*, and the class of cases in which it was held that Greta Green marriages were valid in England, notwithstanding Lord Hardwicke's Marriage Act, 26 Geo. II. c. 33. In observing upon them, I do not lay any stress on the proviso in this act that it should not extend to marriages in Scotland or beyond the seas; this being only an intimation of what might otherwise have been inferred, that its direct operation should be confined to England, and that marriages in Scotland and beyond the seas should continue to be viewed according to the law of Scotland and countries beyond the seas, as if the act had not passed. But I do lay very great stress on the consideration that Lord Hardwicke's Act only regulated banns and licenses, and the formalities by which the ceremony of marriage shall be celebrated. It does not touch the essentials of the contract or prohibit any marriage which was before lawful, or render any marriage lawful which was before prohibited. The formalities which it requires could only be observed in England, and the whole frame of it shows it was only territorial. The nullifying clauses about banns and licenses can only apply to marriages celebrated in England. In this class of cases the contested marriage could only be challenged for want of banns or license in the prescribed form. These formalities being observed, the marriages would all have been unimpeachable. But the marriage we have to decide upon has been declared by the Legislature to be "contrary to God's law," and on that ground it is absolutely prohibited. Here I may properly introduce the words of Mr. Justice Coleridge in *Reg. v. Chadwick*, 11 Q. B. 238, "We are not on this occasion inquiring what God's law or what the Levitical law is. If the Parliament of that day [Henry VIII.] legislated on a misinterpretation of God's law we are bound to act upon the statute which they have passed."

The appellant's counsel next produced a new authority, the very learned and lucid judgment of Dr. Radcliff, in *Steele v. Braddell*, Milw. Eccl. 1. The Irish statute, 9 Geo. II. c. 11, enacts, "that all marriages and matrimonial contracts, when either of the parties is under the age of twenty-one, had without the consent of the father or guardian, shall be absolutely null and void to all intents and purposes; and that it shall be lawful for the father or guardian to commence a suit in the proper Ecclesiastical Court in order to annul the marriage." A young gentleman, a native of Ireland, and domiciled there, went while a minor into Scotland, and there married a Scottish young lady without the consent of his father or guardian. A suit was brought by his guardian in an Ecclesiastical Court in Ireland, in which Dr. Radcliff presided, to annul the marriage on the ground that this statute created a personal incapacity in minors, subjects of Ireland, to contract marriage, in whatever country, without the consent of father or guardian. But the learned judge said, "I cannot find that any Act of Parliament such as this has ever been extended to cases not properly within it,

on the principle that parties endeavored to evade it." And after an elaborate view of the authorities upon the subject, he decided that both parties being of the age of consent, and the marriage being valid by the law of Scotland, it could not be impeached in the courts of the country in which the husband was domiciled, and he dismissed the suit. But this was a marriage between parties who, with the consent of parties and guardians, might have contracted a valid marriage according to the law of the country of the husband's domicil, and the mode of celebrating the marriage was to be according to the law of the country in which it was celebrated. But if the union between these parties had been prohibited by the law of Ireland as "contrary to the word of God," undoubtedly the marriage would have been dissolved. Dr. Radcliff expressly says, "It cannot be disputed that every State has the right and the power to enact that every contract made by one or more of its subjects shall be judged of, and its validity decided, according to its own enactments and not according to the laws of the country wherein it was formed."

Another new case was brought forward, decided very recently by Sir Cresswell Cresswell, *Simonin v. Mallac*, 29 Law J. N. S. Prob. 97. This was a petition by Valerie Simonin for a declaration of nullity of marriage. The petitioner alleged that a pretended ceremony of marriage was had between the petitioner and Léon Mallac of Paris, in the parish church of St. Martin's-in-the-Fields; that about two days afterwards the parties returned to Paris, but did not cohabit, and the marriage was never consummated; that the pretended marriage was in contradiction to and in evasion of the Code Napoléon; that the parties were natives of and domiciled in France, and that subsequently to their return to France the Civil Tribunal of the Department of the Seine had, at the suit of Léon Mallac, declared the said pretended marriage to be null and void. Léon Mallac was served at Naples with a citation and a copy of the petition, but did not appear. Proof was given of the material allegations of the petition, and that the parties coming to London to avoid the French law, which required the consent of parents or guardians to their union, were married by license in the parish church of St. Martin's-in-the-Fields. Sir Cresswell Cresswell, after the case had been learnedly argued on both sides, discharged the petition. But was there anything here inconsistent with the opinion which the same learned judge delivered as assessor to Vice-Chancellor Stuart in *Brook v. Brook*? Nothing whatever; for the objection to the validity of the marriage in England was merely that the forms prescribed by the Code Napoléon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled, forbidding a conjugal union between them; and if the proper forms of celebration had been observed, this marriage by the law of France would have been unimpeachable. The case, therefore, comes into the same category as *Compton v. Bearcroft* and *Steele v. Braddell*, decided by Dr. Radcliff.

None of these cases can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled.

Some American decisions, cited on behalf of the appellants, remain to be noticed. In *Greenwood v. Curtis*, 6 Mass. 358, the general doctrine was acted upon that a contract, valid in a foreign State, may be enforced in a State in which it would not be valid, but with this important qualification, "unless the enforcing of it should hold out a bad example to the citizens of the State in which it is to be enforced." Now the Legislature of England, whether wisely or not, considers the marriage of a man with the sister of his deceased wife "contrary to God's law," and of bad example.

*Medway v. Needham*, 16 Mass. 157, according to the marginal note, decides nothing which the counsel for the respondents need controvert. "A marriage which is good by the laws of the country where it is entered into, is valid in any other country; and although it should appear that the parties went into another State to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will, nevertheless, be valid in the country in which the parties live; but this principle will not extend to legalize incestuous marriages so contracted." This judgment was given in the year 1819. As in England, so in America, some very important social questions have arisen on cases respecting the settlement of the poor. Whether the inhabitants of the district of Medway, or the inhabitants of the district of Needham, were bound to maintain a pauper, depended upon the validity of a marriage between a mulatto and a white woman. They were residing in the province of Massachusetts at the time of the supposed marriage, which was prior to the year 1770. As the laws of the province at that time prohibited all such marriages, they went into the neighboring province of Rhode Island, and were there married according to the laws of that province. They then returned to Massachusetts. Chief Justice Parker held that the marriage was there to be considered valid, and, so far, the case is an authority for the appellants. But I cannot think that it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and in the country of domicile were different; and he took the distinction between cases where the absolute prohibition of the marriage is forbidden on mere motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another State in which this marriage is not prohibited, to celebrate



a marriage forbidden by their own State, and immediately returning to their own State, to insist on their marriage being recognized as lawful. Indeed Chief Justice Parker expressly allowed that his doctrine would not extend to cases in which the prohibition was grounded on religious considerations, saying, "If without any restriction, then it might be that incestuous marriages might be contracted, between citizens of a State where they were held unlawful and void, in countries where they were prohibited."

The only remaining case is *Sutton v. Warren*, 10 Met. 451. The decision in this case was pronounced in 1845. I am sorry to say, that it rather detracts from the high respect with which I have been in the habit of regarding American decisions resting upon general jurisprudence. The question was, whether a marriage celebrated in England on the 24th of November, 1834, between Samuel Sutton and Ann Hills, was to be held to be a valid marriage in the State of Massachusetts. The parties stood to each other in the relation of aunt and nephew, Ann Hills being own sister of the mother of Samuel Sutton. They were both natives of England, and domiciled in England at the time of their marriage. About a year after their marriage they went to America, and resided as man and wife in the State of Massachusetts. By the law of that State a marriage between an aunt and her nephew is prohibited, and is declared null and void. Nevertheless, the Supreme Court of Massachusetts held that this was to be considered a valid marriage in Massachusetts. But I am bound to say that the decision proceeded on a total misapprehension of the law of England. Justice Hubbard, who delivered the judgment of the court, considered that such a marriage was not contrary to the law of England. Now there can be no doubt that although contracted before the passing of 5 & 6 Wm. IV. c. 54, it was contrary to the law of England, and might have been set aside as incestuous, and that act gave no protection whatsoever to a marriage within the prohibited degrees of consanguinity; so that if Samuel Sutton and Ann Hills were now to return to England, their marriage might still be declared null and void, and they might be proceeded against for incest. If this case is to be considered well decided and an authority to be followed, a marriage contrary to the law of the State in which it was celebrated, and in which the parties were domiciled, is to be held valid in another State into which they emigrate, although by the law of this State, as well as of the State of celebration and domicil, such a marriage is prohibited and declared to be null and void. This decisions, my Lords, may alarm us at the consequences which might follow from adopting foreign notions on such subjects, rather than adhering to the principles which have guided us and our fathers ever since the Reformation.

I have now, my Lords, as carefully as I could, considered and touched upon the arguments and authorities brought forward on behalf of the appellants, and I must say that they seem to me quite insufficient to show that the decree appealed against is erroneous.

The law upon this subject may be changed by the legislature, but I am bound to declare that in my opinion, by the existing law of England this marriage is invalid. It is therefore my duty to advise your Lordships to affirm the decree, and dismiss the appeal.

LORD CRANWORTH.<sup>1</sup> There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. And if the marriages of all its subjects were contracted within its own boundaries no such difficulties as that which has arisen in the present case could exist. But that is not the case; the intercourse of the people of all Christian countries among one another is so constant, and the number of the subjects of one country living in or passing through another is so great, that the marriage of the subject of one country within the territories of another must be matter of frequent occurrence. So, again, if the laws of all countries were the same as to who might marry, and what should constitute marriage, there would be no difficulty; but that is not the case, and hence it becomes necessary for every country to determine by what rule it will be guided in deciding on the validity of a marriage entered into beyond the area over which the authority of its own laws extends. The rule in this country, and I believe generally in all countries, is, that the marriage, if good in the country where it was contracted, is good everywhere, subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong.

The real question, therefore, is, whether the law of this country, by which the marriage now under consideration would certainly have been void if celebrated in England, extends to English subjects casually being in Denmark?

I think it does. . . .

Assuming, then, as we must, that such marriages are not only prohibited by our law, but prohibited because they are contrary to the law of God, are we to understand the law as prohibiting them wheresoever celebrated, or only if they are celebrated in England? I cannot hesitate in the answer I must give to such an inquiry. The law, considering the ground on which it makes the prohibition, must have intended to give to it the widest possible operation. If such unions are declared by our law to be contrary to the laws of God, then persons having entered into them, and coming into this country, would, in the eye of our law, be living in a state of incestuous intercourse. It is impossible to believe that the law could have intended this.

It was contended that, according to the argument of the respondent, such a marriage, even between two Danes, celebrated in Denmark, must be contrary to the law of God, and that, therefore, if the parties to it were to come to this country, we must consider them as living in

<sup>1</sup> Part of each of the following opinions is omitted. — ED.

incestuous intercourse, and that if any question were to arise here as to the succession to their property, we must hold the issue of the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our law which makes the marriage void, and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction.

LORD ST. LEONARDS. I consider this as purely an English question. It depends wholly upon our own laws, binding upon all the Queen's subjects. . . . I am clearly of opinion that this marriage was rendered void by the Act of Will. IV.

LORD WENSLEYDALE. Both the judges in the court below form their judgment, first, on the ground of the illegality of such a marriage in England, prohibited from very early times by the legislature, and finally by Lord Lyndhurst's Act, 5 & 6 Will. IV. c. 54; secondly, on the ground that that act itself is to be considered as a personal act, in effect prohibiting all British born subjects, in whatever part of the world they might happen to be, from contracting such marriages, and declaring those marriages to be absolutely void. . . .

It is unnecessary to enter into the discussion of this part of the case, if the other ground is satisfactory, which I think it is. But as at present advised, I dissent upon this point from my noble and learned friend who has just addressed your Lordships. I think the construction put upon this as a personal act is wrong. I do not think the purpose of the statute was to put an end to such marriages by British subjects in any part of the world. Its object was only to make absolutely void thereafter all marriages in this realm between persons within the prohibited degrees of consanguinity or affinity which were previously voidable, that is, which were really void according to our law, though they could be avoided only by a suit in the Ecclesiastical Court, and that could be done only during the life of both the married parties.

It is the established principle that every marriage is to be universally recognized, which is valid according to the law of the place where it was had, whatever that law may be. . . . But this universally approved rule is subject to a qualification. Huber, in his first book, tit. 3, art. 8, says: "*Matrimonium si licitum est eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione, prejudicii aliis non creandi; cui licet addere; si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alieni esse permissum; quod vix est ut usu venire possit.*" A similar qualification is introduced by Story, *Confl. of L.* §§ 113 *a*, 114. He states, that the most prominent, if not the only, known exceptions to the rule, are, first, those marriages involving polygamy and incest; second, those positively prohibited by the public law of

a country from motives of policy, and a third having no bearing upon the question before us.

The statute law of the country, which is binding on all its subjects, . . . must be considered as pronouncing that this marriage is a violation of the Divine law, and therefore that it is void within the first exception made by Mr. Justice Story, and within the principle of the exception laid down by Huber. If our laws are binding, or oblige us, as I think they do, to treat this marriage as a violation of the commands of God in Holy Scripture, we must consider it in a court of justice as prejudicial to our social interest and of hateful example. But if not, it most clearly falls within the second exception stated by Story, which alone, I think, need be considered, as it is clearly illegal by the law of this country whether it be considered incestuous or not, and a violation of that law.

I do not, therefore, in the least doubt that before the 5 & 6 Wm. IV. it would have been pronounced void by the Ecclesiastical Court on a suit instituted during the life of both parties. And therefore I advise your Lordships that the judgment should be affirmed.

*Order appealed against affirmed, and appeal dismissed with costs.*<sup>1</sup>

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### SOTTOMAYOR v. DE BARROS.

COURT OF APPEAL. 1877.

[*Reported 3 Probate Division, 1.*]

COTTON, L. J. This is an appeal from an order of the Court of Divorce, dated the 17th of March, 1877, dismissing a petition presented by Ignacia Sottomayor, praying the court to declare her marriage with the respondent Gonzalo de Barros to be null and void. The respondent appeared to the petition, but did not file an answer or appear at the hearing; and by direction of the judge, the Queen's proctor was served with the petition, and appeared by counsel to argue the case against the petition.

There were several grounds on which the petitioner originally claimed relief, but the only ground now to be considered is that she and the respondent were under a personal incapacity to contract marriage. The facts are these: The petitioner and respondent are Portuguese subjects, and are and have always been domiciled in that country, where they both now reside. They are first cousins, and it was proved that by the law of Portugal first cousins are incapable of contracting marriage by reason of consanguinity, and that any marriage between parties so related is by the law of Portugal held to be incestuous and therefore null and void; but though not proved, it was

<sup>1</sup> *Contra*, Danelli v. Danelli, 4 Bush, 51; Sutton v. Warren, 10 Met. 451. — Ed.

admitted before us that such a marriage would be valid if solemnized under the authority of a papal dispensation.

In the year 1858 the petitioner, her father and mother, and her uncle, De Barros, and his family, including the respondent, his eldest son, came to England, and the two families occupied a house jointly in Dorset Square, London. The petitioner's father came to this country for the benefit of his health, and De Barros for the education of his children and to superintend the sale of wine. De Barros subsequently, in 1861, became manager to a firm of wine merchants in London, carrying on business under the style of Caldos Brothers & Co., of which the petitioner's father was made a partner, and which stopped payment in 1865. On the 21st of June, 1866, the petitioner, at that time of the age of fourteen years and a half, and the respondent, of the age of sixteen years, were married at a registrar's office in London. No religious ceremony accompanied or followed the marriage, and although the parties lived together in the same house until the year 1872, they never slept together, and the marriage was never consummated. The petitioner stated that she went through the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese property from the consequences of the bankruptcy of the wine business.

Under these circumstances the petitioner, in November, 1874, presented her petition for the object above mentioned, and Sir R. Phillimore, before whom the case was heard, declined to declare the marriage invalid and dismissed the petition, but did so, as we understand, rather because he felt himself bound by the decision in the case of *Simonin v. Mallac*, 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97, than because he considered that on principle the marriage ought to be held good. If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid. But it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between

persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized. In argument several passages in Story's *Conflict of Laws* were referred to, in support of the contention that in an English court a marriage between persons who by our law may lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicile, unless the marriage is one which the general consent of Christendom stamps as incestuous. It is hardly possible to suppose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous. Probably the true explanation of the passages in Story is given in *Brook v. Brook*, 9 H. L. C. 193, at pp. 227, 241, by Lord Cranworth and by Lord Wensleydale, who express their opinions that he is referring to marriages not prohibited or declared to be incestuous by the municipal law of the country of domicile.

But it is said that the impediment imposed by the law of Portugal can be removed by a Papal dispensation, and, therefore, that it cannot be said there is a personal incapacity of the petitioner and respondent to contract marriage. The evidence is clear that by the law of Portugal the impediment to the marriage between the parties is such that, in the absence of Papal dispensation, the marriage would be by the law of that country void as incestuous. The statutes of the English Parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous; but the law of Portugal does recognize the validity of such a dispensation, and it cannot in our opinion be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected, or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage. It is proved that the courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void, as solemnized between parties incapable of marrying, and incestuous. How can the courts of this country hold the contrary, and, if appealed to, say the marriage is valid? It was pressed upon us in argument that a decision in favor of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicile of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognize the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being

relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognized by the law of this country.

The counsel for the petitioner relied on the case of *Brook v. Brook*, as a decision in his favor. If, in our opinion, that case had been a decision on the question arising on this petition, we should have thought it sufficient without more to refer to that case as decisive. The judgment in that case, however, only decided that the English courts must hold invalid a marriage between two English subjects domiciled in this country, who were prohibited from intermarrying by an English statute, even though the marriage was solemnized during a temporary sojourn in a foreign country. It is, therefore, not decisive of the present case; but the reasons given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based.

It only remains to consider the case of *Simonin v. Mallac*. The objection to the validity of the marriage in that case, which was solemnized in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin v. Mallac* does not, we think, govern the present case. We are of opinion that the judgment appealed from must be reversed, and a decree made declaring the marriage null and void.

*Judgment reversed.*<sup>1</sup>

<sup>1</sup> The case having been sent down to the Probate Division of the High Court, Sir JAMES HENXEN, President, found that though the petitioner was domiciled in Portugal at the time of the marriage, the respondent was domiciled in England at that time; and he held the marriage valid. In the course of his opinion he said: "The Lord Justices appear to have laid down as a principle of law a proposition which was much wider in its terms than was necessary for the determination of the case before them. It is thus expressed: 'It is a well recognized principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicile;' and again, 'As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile.' It is of course competent for the Court of Appeal to lay down a principle which, if it formed the basis of a judgment of that court, must, unless it should be disclaimed by the House of Lords, be binding in all future cases. But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been 'well recognized.' On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the other way." — ED.

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## WARTER v. WARTER.

HIGH COURT OF JUSTICE, PROBATE DIVISION. 1890.

[*Reported 15 Probate Division, 152.*]

SIR JAMES HANNEN, PRESIDENT. The plaintiff claims probate of a will<sup>1</sup> dated February 6, 1880, made by her father, Henry De Grey Warter, who died on March 23, 1889. The defendant, the son of Henry De Grey Warter, alleges that the will, dated February 6, 1880, was revoked by the subsequent marriage of the testator with Annette Louisa Tayloe on April 2, 1881. The question in the cause is whether the marriage celebrated on April 2, 1881, was the marriage of the parties—that is, whether they had not concluded a valid marriage before the execution of the will—namely, on February 3, 1880. The material facts are as follows: The mother of the plaintiff and defendant was formerly the wife of John Edward Tayloe, and was resident with him in India. In 1879 Henry De Grey Warter, the deceased in this cause, was a major in the Royal Artillery, stationed in India. In 1879 John Edward Tayloe, being so resident, instituted proceedings in the High Court of Judicature at Fort William in Bengal for the dissolution of his marriage on the ground of his wife's adultery with Major De Grey Warter, and a decree nisi was pronounced on May 19, 1879. This decree was made absolute on November 27, 1879. By the Indian Divorce Act of 1869, "jurisdiction is given to dissolve the marriage when the petitioner professes the Christian religion and resides in India at the time of presenting the petition—that is, though he or she may not be domiciled there. On the institution of the proceedings Mrs. Tayloe returned to England. Major De Grey Warter afterwards joined her in England, and went through a ceremony of marriage on February 3, 1880. At the time of the marriage Major De Grey Warter was domiciled in England. By the Indian Divorce Act—Act No. 4 of 1869—under which the proceedings were taken, it is enacted that "when six months after the date of any decree of the High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death." The marriage in question in this case took place within three months of the decree. It was contended that as this marriage was celebrated in England the parties were freed from the restraint imposed by the Indian Divorce Act. I am of opinion that that is not the case. Mrs. Tayloe was subject to the Indian law of divorce, and she could only contract a valid second marriage by showing that the incapacity arising from her

<sup>1</sup> By the terms of his will Colonel Warter left all his property to his "reputed wife."—ED.



previous marriage had been effectually removed by the proceedings taken under that law. This could not be done, as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage. The case of *Scott v. Attorney-General*, 11 P. D. 128, was relied on for the plaintiff. I there held that a colonial law prohibiting the marriage of the guilty party, so long as the other remained unmarried, did not operate as a bar to marriage where the guilty party had acquired a domicile in this country. The distinction between that case and the present is that there the incapacity to remarry imposed by the colonial law only attached to the guilty party. It was, therefore, penal in its character, and as such was inoperative out of the jurisdiction under which it was inflicted. A case to the same effect, and based on the same principle, was cited from an American report: *Ponsford v. Johnson*, 2 Blatchf. 51. For these reasons I am of opinion that the marriage of February 3, 1880, was invalid, and consequently that the will of February 6, 1880, was revoked by the valid marriage celebrated on April 2, 1881.<sup>1</sup>

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WALL v. WILLIAMSON.

SUPREME COURT OF ALABAMA. 1845.

[*Reported*, 8 *Alabama*, 48.]

ASSUMPSIT, by Williamson, against the defendant, as the maker of a promissory note. At the trial, upon the general issue, the defendant produced evidence tending to prove, that she and one David Wall lived together, as man and wife, from the year 1831 until the year 1839, in the territory belonging to the Choctaw Indians, until that was annexed to, and made the county of Sumter; after which they lived in the same relation, in that county, near the same place where they previously had resided, and until the said David left the State of Alabama, in 1839, and went to the Choctaw country, west of the Mississippi. Both were of Indian extraction, and of the Choctaw tribe; that they were regarded as man and wife by the tribe, and as having been properly married, according to the laws and customs of the Choctaws. The defendant had said, that she had been advised that she had not been legally married; that she had been married in the Choctaw territory, by one Pistole, a justice of the peace from Marengo County. It was also in proof, that by the laws and customs of the Choctaws, the husband, by his marriage, takes no part of his wife's property; that among them, a man takes a wife at pleasure, and dissolves the marriage whenever he pleases, and that the men are allowed a plurality of wives.

<sup>1</sup> *Acc. McLennan v. McLennan*, 13 Or. 480, 50 Pac. 802. — ED.

Upon this state of proof, the defendant requested the court to instruct the jury, that a marriage under the laws and customs of the Choctaws, entered into in a place where such laws and customs are in force, is recognized as a valid marriage by the laws of Alabama, when the same are extended over the territory where the parties so married reside.

This was refused, and the court charged the jury — 1. That the living together of an Indian man and woman would not be regarded by the laws of this State, as such a marriage as would affect a contract entered into by the female. 2. That if the defendant was abandoned by Wall, and she executed the note after he had left her, that she would be bound by her contract, although she might have been married. 3. That if, according to the customs among the Choctaws, the parties to a marriage can dissolve it at pleasure, by mere separation, and that the defendant and Wall did so separate, then the defendant was liable on her contract, as a *feme sole*.

The defendant excepted to the refusal of the court to give the charge requested, as well as to those given, and error is assigned upon the bill of exceptions.

GOLDTHWAITE, J. Previous to entering upon the consideration of the questions raised, by the refusal to give the charge requested by the defendant, it is not improper to ascertain what facts had to be ascertained by the jury, from the evidence. The existence of a marriage between David Wall and the defendant, at the time when the note sued on was given by Mrs. Wall, was one of the principal matters to be passed upon. Once established, to the satisfaction of the jury, as having been entered into, in conformity with the usages of the Choctaw tribe of Indians, its effect, in connection with the laws of this State, became a very material subject of inquiry. The defendant insisted then, and now, that if this marriage was valid, by the laws and usages of the Choctaw tribe of Indians, it is recognized as valid by the laws of Alabama. The validity of the marriage, and not the consequences of it, as to the defendant, was, at that time, the subject for instruction. If the marriage is not to be recognized as valid by our law, it was of no consequence to the defendant what further charge was given for or against her, because her entire defence rested on sustaining that proposition. All the testimony in relation to rights of husband and wife under the Choctaw law may have been of a disputable or doubtful nature. These observations are called for because it has been assumed that this charge was immaterial, and that all the case is covered by the charge actually given by the court.

1. With respect to the refusal of this charge, it is not unlikely that the Circuit Court intended to be understood by the counsel that the charge was refused, not as an incorrect proposition, but for the reason that the case was clear for the plaintiff, even if it was conceded. If such was the impression of the court, the charge should have been given, with the necessary explanation to direct the jury to the consideration of those points deemed to be more material. The general rule

upon this subject is, that a marriage valid at the place where contracted is deemed to be valid everywhere else. Story, *Conf. of Laws*, §§ 77, 79, 103, 113 *a*. It is said by the same author that the most prominent, if not the only exceptions to this rule, are those marriages involving polygamy and incest. *Ib.* § 113 *a*, 114.

These, the learned author says, Christianity is understood to prohibit, and therefore no Christian country would recognize polygamous or incestuous marriages. Lord Brougham, in *Warrender v. Warrender*, (cited in a note to § 114, 9 *Bligh*. 112.) says, "It is important to observe that we regard it (marriage) as a wholly different thing, a different status, from Turkish or other marriages among infidel nations; because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate." If this doctrine is to be understood as leading to the conclusion that a court can collaterally inquire into the existence of such a relationship as would, in a direct proceeding, annul the marriage, it is very questionable whether it is sustainable. 1 *Black. Com.* 434. A parallel case to a Turkish or other marriage in an infidel country will probably be found among all our savage tribes, but can it be possible that the children must be illegitimate if born of the second or other succeeding wife? However the true rule may be, it is immaterial to this case, unless it can be shown that when the law tolerates polygamy, there can be neither lawful wife nor legitimate children, for here the evidence does not disclose any previous marriage.

The validity of the marriage may possibly have been denied upon the impression that having been contracted within the territorial limits of the State, it cannot be affected by Choctaw usages or customs, though both parties were of that tribe and resident within its bounds.

2. The refusal cannot be sustained on this ground. Waiving the consideration of the peculiar relation which these Indian tribes bear to the States, within the limits of which they were resident, and assuming that the individuals composing the tribes could by the States have been made subject to their general laws, the question yet remains whether, at the time of this supposed marriage, the laws and usages of the Choctaw tribe had been abolished or superseded; or whether they composed a distinct community, governed by their own chiefs and laws. It is not pretended that any statute producing this effect was then passed, and therefore, if lost at all, their local laws must have been lost in consequence of their living within the territorial limits of the States. It may be difficult to ascertain the precise period of time when one nation, or tribe, is swallowed up by another, or ceases to exist; but until then there cannot be said to be a merger. It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror. The mere acquisition, whether by treaty or war, produces no such effect. It may therefore be considered that the usages and customs of the Choctaw tribe continued as their law, and

governed their people, at the time when this marriage was had. The consequence is, that if valid by those customs it is so recognized by our law.<sup>1</sup>

For that error, in refusing thus to charge, the judgment must be reversed and the cause remanded.

3. But although this result is arrived at, it yet remains necessary to ascertain what further instructions ought to have been, or should be, given. The evidence tended to show that by the Choctaw law the husband takes no part of the wife's property. A necessary consequence of this peculiarity is, that the wife must have the capacity to contract, for otherwise she would be incapable, in many instances, to preserve or protect her property. The bill of exceptions is silent as to any positive law among them, as to this point, but the inference is direct and immediate, from what was proved. Having, by their law, the capacity to contract, it is also likely that means were provided by it for its enforcement; but if that was the case, we do not see how she could be sued in a court of law, so long as the marriage continued. It would present nothing but the case of a wife with a separate estate to her own use. It may be possible that the objection to the form of action could not be urged at the trial, but it is unnecessary to consider this point further, because we are clear that the marriage was dissolved according to Choctaw usages by the abandonment of the husband.

4. Whatever may have been the capacity of the husband to abandon his wife, and thereby to dissolve the marriage, if both had become residents of Alabama after the tribe had departed from its limits, it is very clear that the same effect must be given to a dissolution of the marriage by the Choctaw law as given to the marriage by the same law. By that law it appears the husband may at pleasure dissolve the relation. His abandonment is evidence that he has done so. We conceive the same effect must be given to this act as would be given to a lawful decree in a civilized community dissolving the marriage. However strange it may appear, at this day, that a marriage may thus easily be dissolved, the Choctaws are scarcely worse than the Romans, who permitted a husband to dismiss his wife for the most frivolous causes. Story, *Conf. of Laws*, 169.

The jury then should have been instructed that notwithstanding the marriage, if contracted according to Choctaw usage, between members of the tribe, in their own territory, before their laws were abrogated, was valid, yet the wife had the capacity to contract, and in case of a valid contract, was liable to be sued as a *feme sole*, if the marriage could, by the Choctaw law, be dissolved by the husband at his pleasure, and was so dissolved, which might be inferred if the husband abandoned his wife and went with his tribe beyond the Mississippi or elsewhere.

*Judgment reversed and remanded.*

<sup>1</sup> *Acc. Kobogum v. Jackson Iron Co.*, 76 Mich. 498, 43 N. W. 602; *Earl v. Godley*, 42 Minn. 361; *Johnson v. Johnson*, 30 Mo. 72; *Morgan v. McGhee*, 5 Humph. 13; *Connolly v. Woolrich*, 11 L. Can. Jur. 197; *Ngqobela v. Sihele*, 10 Juta (Cape Colony), 346. *Contra, In re Bethell*, 38 Ch. D. 220. — ED.

## ROCHE v. WASHINGTON.

SUPREME COURT OF INDIANA. 1862.

*[Reported 19 Indiana, 53.]*

PERKINS, J. Suit for partition, instituted by Francis Washington against John Roche. Partition adjudged. Motion for a new trial overruled. Commissioners report partition. Report confirmed. New trial denied. Appeal to this court.

The cause was decided upon the following agreed case :

"It is hereby agreed, by the parties to this action, that the following are the facts of the case : The land in question, of which partition is prayed, was the property of La-ka-ko-quah, alias Jane Richardville, who died seized of the same in 1857, leaving no children, nor father or mother, but leaving her husband, as hereinafter stated, whose name is George Washington, and her sister, Catharine Richardville, her brother, Snap Richardville, and Francis Washington, the plaintiff, who is an only son of her sister, Ah-tah-pe-tah-neah, deceased. It is further agreed, that the defendant, John Roche, has the title of George Washington, Catharine and Snap Richardville, conveyed to him since the decease of the said Jane Richardville. It is further agreed, that all of the foregoing persons, except the defendant, are, or were, Miami Indians.

"It is further agreed, that, in the year 1844, the said George Washington, according to the manner and custom of marriage in said Miami tribe of Indians, was duly married to Le-quah, a Miami Indian, with whom he lived, residing in Huntington County, Indiana, where a part of the said Miami tribe then and since have resided ; that in the year 1846 the said George Washington and the said Le-quah, according to the manner and custom of divorce in said Miami tribe, were duly divorced ; that in the same year, 1846, said Le-quah removed to Kansas territory, where she has since resided, and now resides ; that afterward, in the year 1847, said George Washington, according to the custom of said tribe of Indians, was married to the said Ah-tah-pe-tah-neah, who departed this life in 1852, leaving said Francis Washington her only surviving child ; that afterward, in 1853, said George Washington, according to the custom of said Indian tribe, was married to said La-ka-ko-quah, alias Jane Richardville, and that the two lived together, and cohabited as man and wife, till her death, at the county of Huntington, in 1857, she dying childless.

"It is further agreed, that the Indian custom of marriage requires no ceremony further than the agreement of the parties to live together as husband and wife, the agreement being consummated by living and cohabiting together as such.

"It is further agreed, that the Indian custom of divorce requires no special form of proceeding, other than that the parties disagree, and,

by consent, separate, the mother usually taking care of, and receiving the annual payment of the Government to, the children; and that the said customs of marriage and divorce are the ancient, immemorially continued, and present existing customs among all of said tribe of Indians, and the law thereof; and that the same have continued to exist, as their customs and laws, from a period beyond the memory of man."

The question intended to be presented for our decision in this cause is, whether the courts of Indiana will hold valid, as marriages, such unions, and as divorces, such separations, as those described in the agreed statement of facts, they having been made under, and being sanctioned by, the laws of the Miami tribe of Indians.

It is claimed that, by the law of nations, the courts of Indiana must uphold Indian marriages. The law of nations, or international law, is mainly of modern origin, growing out of increased commercial and social intercourse, and exists only among civilized States. 1 Kent, p. 1. It is very properly divided by late writers into public and private. Public, that which regulates the political intercourse of nations with each other. Private, that which regulates the comity of States in giving effect, in one, to the municipal laws of another, relating to private persons, their contracts, etc.

The first question to be decided is, then, Does a tribe of North American Indians constitute a State? We think not. A State has been defined to be "a people permanently occupying a fixed territory, bound together by common laws, habits, and customs [or by a constitution], into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into international relations with other communities." See New Am. Cyclop. vol. x., p. 360; Wheat. L. of Nations, pp. 53, 54; 1 Kent, 188, 189. But few of the particulars enumerated as constituting a State, exist in a tribe of North American Indians. See, however, *The Cherokee Nation v. Georgia*, 5 Pet. (U. S.) Rep. 1. This the court judicially takes notice of as matter of general historical knowledge; the Indians are not educated above the condition of nomadic, pastoral tribes, if up to it. Neither, were these tribes conceded to be States or nations, in the political or international sense of the terms, are they civilized.

Civilization, it is true, is a term which covers several states of society; it is relative, and has not a fixed sense; but, in all its applications, it is limited to a state of society above that existing among the Indians of whom we are speaking. It implies an improved and progressive condition of the people, living under an organized government, with systematized labor, individual ownership of the soil, individual accumulations of property, humane and somewhat cultivated manners and customs, the institution of the family, with well-defined and respected domestic and social relations, institutions of learning, intellectual activity, etc. We know, historically, that the North American Indians

are classed as savage and not as civilized people; and that, in fact, it is problematical whether they are susceptible of civilization.

But, let it be admitted that the Miami tribe of Indians constitutes an international political State, and that it is a civilized one, still the State of Indiana is not bound by international comity to give effect, in her courts, to all the laws and customs of such State, but only to such as are not repugnant to her own laws and policy. 1 Ind. 24.

Laws giving effect to contracts of marriage are not repugnant to the laws of Indiana, and the proposition is established, as a general one, in private international law, that an actual marriage, valid in the country where celebrated, will, not as upon a claim of right, but by courtesy, be given effect to in other States, though not celebrated by the forms nor evidenced in the mode prescribed for marriages in such other States. If, then, in the case at bar, an actual marriage took place between Jane Richardville and George Washington, there could be no objection to its being upheld in the courts of this State, though celebrated among an uncivilized tribe of Indians.

What, then, constitutes the thing called a marriage? what is it in the eye of the *jus gentium*? It is the union of one man and one woman, "so long as they both shall live," to the exclusion of all others, by an obligation which, during that time, the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by authority of the State. Nothing short of this is a marriage. And nothing short of this is meant, when it is said, that marriages, valid where made, will be upheld in other States. Noel v. Ewing, 9 Ind. 37; Story's Conflict of Laws, chap. v.; Wheaton's Law of Nations, 137. See Reynolds v. Reynolds, 3 Allen (Mass.) Rep. 605. From what has been said, it is manifest that the union between Jane and George, described in the statement of facts in the case at bar, was not a marriage, according to the law of any civilized nation, but simply and exactly a contract and state of concubinage. See Cobb on Slavery, 245, note 4; The State v. Sammel, 2 Dev. and Bat. (N. C.) Rep. 177. But, suppose the union had been such as to constitute marriage, according to the *jus gentium*, and which the courts of this State would have upheld as such, it might not still have followed, as a consequence, that the husband would have inherited, from the wife, her real estate. The marriage is one thing, and the incidents, the legal rights, and consequences attaching upon marriage, are another; and these may be different as to real and personal property. 2 Kent, p. 93 *et seq.* Marriage, in different countries, is followed by different property rights. In the Miami nation, or tribe of Indians, marriage, supposing we concede their unions of sexes to be such, is not followed by a right in either party, by the law of the tribe, to inherit real estate from the other; for the Indians, by their laws, neither in their tribal capacity, nor individually, owned any real estate. It is a kind of property unknown to them. They simply hold vaguely defined territory, for use in hunting, fishing, etc., and they never assumed to, and could not convey, the fee, to any one. That belonged,

first, to Great Britain, as the discovering nation, and to the United States afterward, by succession to Great Britain; and it is under our laws only that any individual among these Indians ever obtained, conveyed, or inherited real estate. See *Fellows v. Denniston*, 23 N. Y. Rep. 420; *The Cherokee Nation v. Georgia*, 5 Pet. (U. S.) Rep. 1. This is the doctrine of international law held by civilized States, and acted upon without consulting the Indians. It is based or justified on the ground that the Indians never cultivated the soil. But the case does not turn on any of the foregoing points, and they need not, therefore, be regarded as decided. See, on the general subject, *Dale v. Irish*, 2 Barb. 639; *Wall v. Williamson*, 8 Ala. 48; 11 Ala. 826, and 10 Ala. 630. Also, *Jones v. Laney*, 2 Texas, 342, and the cases in the Supreme Court of the United States, cited in *Cush. Dig.* 240.

A treaty, however, we may remark, may be made between a government and an association of persons not constituting an independent government. The Constitution of the United States authorizes our government to treat with foreign nations, and to regulate affairs with States and Indian tribes. We know, as a part of the law of the land, and the history of our State, that the last treaty between the Miami tribe of Indians, located in Indiana, and the United States, was in 1840; that the tribe then agreed to remove from Indiana to west of the Mississippi river; that, in 1846, the agreement was executed, the chiefs at that time extinguishing their council fires upon the Wabash, and, accompanied by most of the living members of their tribe, departing for their newly assigned and distant home. The sovereignty of the tribe, so far as it possessed sovereignty, its jurisdictional power, so far as it possessed such over persons and property in Indiana, disappeared with the light of its council fires, and departed to the new seat of the tribe.

Now, it is true as a general proposition, that the laws of a nation are operative only within the limits of the territory over which the jurisdiction of the nation extends. They do not, as a general proposition, follow the individuals of such nation into the jurisdictional limits of another nation, so as to attach to acts done in such other nation. Hence, if citizens of Great Britain, of China, or of Africa, contract marriage in Indiana, that contract, to be valid, must conform to the laws of Indiana. 1 *Bright's Husband and Wife*, p. 8; 1 *Greenleaf's Ev.*, § 545. For exceptions to the general proposition above stated, see *Wheaton's Law of Nations*, p. 132, third edition. The marriage, in the case at bar, was contracted in Indiana, between Miami Indians who did not accompany the tribe to the West, but remained to live among our people; and it was contracted after all territorial jurisdiction of the tribe had ceased in the State, and after the tribe itself, with its government, had disappeared from our borders. The marriage, therefore, was clearly to be tested by the law of Indiana; certainly so when it came in question in our own tribunals.

*The judgment below is affirmed, with costs.*



## COMMONWEALTH v. LANE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[Reported 113 *Massachusetts*, 458.]INDICTMENT on the Gen. Sts. c. 165, § 4, for polygamy.<sup>1</sup>

GRAY, C. J. The report finds that the defendant was lawfully married to his first wife in this Commonwealth; that she obtained a divorce here from the bond of matrimony, for his adultery; that he was afterwards, while still a resident of this Commonwealth, married to a second wife in the State of New Hampshire, and cohabited with her in this Commonwealth, the first wife being still alive; and the question is whether he is indictable for polygamy, under the Gen. Sts. c. 165, § 4.

It is provided by our statutes of divorce that, in cases of divorce from the bond of matrimony, the innocent party may marry again as if the other party were dead; but that any marriage contracted by the guilty party during the life of the other, without having obtained leave from this court to marry again, shall be void, and such party shall be adjudged guilty of polygamy. Gen. Sts. c. 107, §§ 25, 26; St. 1864, c. 216.

The marriage act, Gen. Sts. c. 106, specifies, in §§ 1-3, what marriages shall be void by reason of consanguinity or affinity; in § 4, that all marriages contracted while either of the parties has a former wife or husband living, except as provided in c. 107, shall be void; in § 5, that no insane person or idiot shall be capable of contracting marriage; and in § 6 as follows: "When persons resident in this State, in order to evade the preceding provisions, and with an intention of returning to reside in this State, go into another State or country, and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be deemed void in this State."

All these sections, except the last, are manifestly directed and limited to marriages within the jurisdiction of this Commonwealth; and the last has no application to this case, because it does not appear to have been proved or suggested at the trial that the parties to the second marriage went out of this State to evade our laws, or even that the second wife had resided in this State or knew of the previous marriage and divorce.

By the Gen. Sts. c. 165, § 4, "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this State," shall (except when the first husband or wife has for seven years been absent and not known to the other party to be living, or in case of a person legally divorced from the bonds of matrimony and not the guilty cause of such divorce) be deemed guilty of polygamy and punished accordingly.

This statute is not intended to make any marriages unlawful which

<sup>1</sup> Statement of facts and arguments of counsel are omitted.—Ed.

are not declared to be unlawful by other statutes, nor to punish cohabitation under a lawful marriage. Its object is to prohibit unlawful second marriages, whether the parties are actually married in this Commonwealth, or continue after being married elsewhere to cohabit here. But in either alternative, in order to sustain the indictment, the second marriage must be unlawful. It is not enough that the marriage is such as would be unlawful if contracted in this Commonwealth; it must be a marriage which, being contracted where it was, is unlawful here.

The marriage in New Hampshire is stated in the report to have been "according to the forms of law;" and it appears by the statutes of New Hampshire, therein referred to, that the only provision relating to the invalidity of marriages on account of the incompetency of parties to contract them is as follows: "All marriages prohibited by law, on account of the consanguinity or affinity of the parties, or where either has a former wife or husband living, knowing such wife or husband to be alive, if solemnized in this State, shall be absolutely void without any decree of divorce or other legal process." Gen. Sts. of N. H. (1867), c. 163, § 1. That provision clearly does not extend to a case in which the former wife, having obtained a divorce from the bond of matrimony, was absolutely freed from all obligation to the husband, and in which, as observed by Mr. Justice Wilde, in a like case, "notwithstanding the restraints imposed on the husband, he being the guilty cause of the divorce, the dissolution of the marriage contract was total, and not partial." *Commonwealth v. Putnam*, 1 Pick. 136, 139. The marriage in New Hampshire must therefore be taken to have been valid by the law of that State.

The question presented by the report is therefore reduced to this: If a man who has been lawfully married in this Commonwealth, and whose wife has obtained a divorce *a vinculo* here because of his adultery, so that he is prohibited by our statutes from marrying again without leave of this court, is married, without having obtained leave of the court, and being still a resident of this Commonwealth, to another woman in another State, according to its laws, and afterwards cohabits with her in this Commonwealth, is his second marriage valid here?

The determination of this question depends primarily upon the construction of our statutes, but ultimately upon fundamental principles of jurisprudence, which have been clearly declared by the judgments of our predecessors in this court, and in the light of which those statutes must be read in order to ascertain their just extent and effect.

What marriages between our own citizens shall be recognized as valid in this Commonwealth is a subject within the power of the legislature to regulate. But when the statutes are silent, questions of the validity of marriages are to be determined by the *jus gentium*, the common law of nations, the law of nature as generally recognized by all civilized peoples.

By that law, the validity of a marriage depends upon the question

whether it was valid where it was contracted; if valid there, it is valid everywhere.

The only exceptions admitted by our law to that general rule are of two classes: 1st. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries; 2d. Marriages which the legislature of the Commonwealth has declared shall not be allowed any validity, because contrary to the policy of our own laws.

The first class includes only those void for polygamy or for incest. To bring it within the exception on account of polygamy, one of the parties must have another husband or wife living. To bring it within the exception on the ground of incest, there must be such a relation between the parties contracting as to make the marriage incestuous according to the general opinion of Christendom; and, by that test, the prohibited degrees include, beside persons in the direct line of consanguinity, brothers and sisters only, and no other collateral kindred. *Wightman v. Wightman*, 4 Johns. Ch. 343, 349-351; 2 Kent Com. 83; Story, Conf. § 114; *Sutton v. Warren*, 10 Met. 451; *Stevenson v. Gray*, 17 B. Mon. 193; *Bowers v. Bowers*, 10 Rich. Eq. 551.

A marriage abroad between persons more remotely related, not absolutely void by the law of the country where it was celebrated, is valid here, at least until avoided by a suit instituted for the purpose, even if it might have been so avoided in that country; and this is so whether the relationship between the parties is one which would not make the marriage void if contracted in this Commonwealth, as in the case of a marriage between a widower and his deceased wife's sister, or one which would invalidate a marriage contracted here, as in the case of a marriage between aunt and nephew.

In *Greenwood v. Curtis*, 6 Mass. 358, 378, 379, Chief Justice Parsons said: "If a foreign State allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one State, and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States; such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract." This distinction was approved by Chancellor Kent and by Judge Story. 2 Kent Com. 85, note a; Story, Conf. § 116.

In *The Queen v. Wye*, 7 A. & E. 761, 771; s. c. 3 N. & P. 6, 13, 14; it was decided that the marriage of a man with his mother's sister in England before the St. of 5 & 6 Will. IV. c. 54, though voidable by process in the ecclesiastical courts, was, until so avoided, valid for all civil purposes, including legitimacy and settlement. In accordance with that decision, it was held in *Sutton v. Warren*, 10 Met. 451, that such a marriage contracted in England, and never avoided there, must, upon the subsequent removal of the parties to Massachusetts, and the

question arising collaterally in an action at common law, be deemed valid here, although, if contracted in this Commonwealth, it would have been absolutely void.

A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the State shall have no validity here. This has been repeatedly affirmed by well-considered decisions.

For example, while the statutes of Massachusetts prohibited marriages between white persons and negroes or mulattoes, a mulatto and a white woman, inhabitants of Massachusetts, went into Rhode Island, and were there married according to its laws, and immediately returned into Massachusetts; and it was ruled by Mr. Justice Wilde at the trial, and affirmed by the whole court, that the marriage, even if the parties went into Rhode Island to evade our laws, yet, being good and valid there, must upon general principles be so considered here, and that the wife therefore took the settlement of her husband in this Commonwealth. *Medway v. Needham*, 16 Mass. 157.

So it has been held that a man, from whom his wife had obtained in this State a divorce *a vinculo* for his adultery, which by our statutes disabled him from contracting another marriage, might lawfully marry again in another State according to its laws; that the children of such marriage took the settlement of their father in this Commonwealth; and that the new wife was entitled to dower in his lands here, even if the wife as well as the husband was domiciled here, and knew of the previous divorce and its cause, and went into the other State to evade our laws—so long as our statutes did not declare a marriage contracted there with such intent to be void here. *West Cambridge v. Lexington*, 1 Pick. 506; *Putnam v. Putnam*, 8 Pick. 433. See also *Dickson v. Dickson*, 1 Yerger, 110; *Ponsford v. Johnson*, 2 Blatchf. C. C. 51; 2 Kent Com. 91–93.

The principles upon which these decisions proceeded were recognized in all the English cases decided before the American Revolution, although it is true, as has since been pointed out, that the particular question in each of them related rather to the forms required than to the capacity of the parties.

Lord Hardwicke's Marriage Act in 1752 provided that all marriages of minors, solemnized by license without the consent of parents or guardians, should be void. St. 26 Geo. II. c. 33, § 11. Yet in the first case which arose under that act, in which an English boy of eighteen years old went abroad with an English woman, and was there married to her without such consent, Lord Hardwicke, sitting as chancellor, assumed that if the marriage had been valid by the law of the country in which it was celebrated, it would have been valid in England, saying: "It will not be valid here unless it is so by the laws of

the country where it was had; and so it was said by Murray, attorney-general, to have been determined lately at the Delegates." And it would seem by the report that the woman defeated an application to the Ecclesiastical Court to annul the marriage, by refusing to appear there. *Butler v. Freeman*, Ambl. 301.

The case, thus referred to as determined at the Delegates, was evidently *Scrimshire v. Scrimshire*, decided by Sir Edward Simpson in the Consistory Court in 1752. Of that opinion, Sir George Hay, in *Harford v. Morris*, 2 Hagg. Con. 423, 431, said, "Every man has allowed the great and extensive knowledge of the judge;" and Sir William Wynne, in *Middleton v. Janverin*, 2 Hagg. Con. 437, 446, remarked that he remembered to have heard that the judgment was founded on great deliberation, and that Lord Hardwicke was consulted on it.

In *Scrimshire v. Scrimshire*, Sir Edward Simpson, in delivering judgment, said: "The question being in substance this, Whether, by the law of this country, marriage contracts are not to be deemed good or bad according to the law of the country in which they are formed; and whether they are not to be construed by that law? If such be the law of this country, the rights of English subjects cannot be said to be determined by the laws of France, but by those of their own country, which sanction and adopt this rule of decision." "All nations allow marriage contracts; they are *juris gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries.—that is, the law where the contract is made." And he declared the marriage in that case to be invalid, only because it appeared to be wholly null and void by the laws of France, where it was celebrated. 2 Hagg. Con. 395, 407, 408, 417, 421.

In *Compton v. Bearcroft* (1767–69), where the parties, both being English subjects and the libellant a minor, ran away and were married in Scotland, a libel for the nullity of the marriage was dismissed by Sir George Hay in the Court of Arches, upon the ground that Lord Hardwicke's Act did not extend to Scotland; but by the Court of Delegates on appeal, consisting of Justices Gould and Aston, Baron Perrott, and two doctors of civil law, upon the broader ground that the marriage was good by the *lex loci*. 2 Hagg. Con. 430, 443, 444, and note; s. c. Bul. N. P. 113, 114. See also *Ilderton v. Ilderton*, 2 H. Bl. 145; *Dalrymple v. Dalrymple*, 2 Hagg. Con. 54, 59; *Ruding v. Smith*, ib. 371, 390, 391; *Steele v. Braddell*, Milward, 1, 21.

In a recent case in the House of Lords, the cases of *Medway v.*

Needham, 16 Mass. 157, and *Sutton v. Warren*, 10 Met. 451, above cited, have been severely criticised, and pointedly denied to be law. *Brook v. Brook*, 9 H. L. Cas. 193; s. c. 3 Sm. & Giff. 481. As that court is the one of all foreign tribunals, the opinions of which, owing to the learning, experience, and ability of the judges, we are accustomed to regard with the most respect, it becomes necessary to examine with care the scope of that decision, and the soundness of the reasons assigned for it; and in order to make this examination intelligible, it will be convenient first to refer to the English statutes and to some earlier decisions.

Several statutes of Henry VIII., which it is necessary to state in detail, declared marriages within certain degrees of consanguinity and affinity, and among others the marriage of a widower with his deceased wife's sister, to be "contrary to God's law as limited and declared by act of Parliament." Sts. 25 Hen. VIII. c. 22; 28 Hen. VIII. cc. 7, 16; 32 Hen. VIII. c. 38. While those statutes remained unaltered, a period of nearly three hundred years, such marriages were held by the judges not to be absolutely void, but voidable only by suit in the ecclesiastical courts during the lifetime of both parties, and, if not so avoided, were treated as valid, the wife entitled to dower, and the children of the marriage legitimate. Co. Lit. 33; *Hinks v. Harris*, 4 Mod. 182; s. c. 12 Mod. 35; Carth. 271; 2 Salk. 548. Lord Hardwicke, in *Brownsword v. Edwards*, 2 Ves. Sen. 243, 245; 1 Bl. Com. 434, 435; *Elliott v. Gurr*, 2 Phillim. 16; *The Queen v. Wye*, 7 A. & E. 761, 771; s. c. 3 N. & P. 6, 13, 14; *Westby v. Westby*, 2 Dru. & War. 502, 515, 516; s. c. 1 Con. & Laws. 537, 544, 545; 4 Irish Eq. 585, 593.

The St. of 5 & 6 Will. IV. c. 54, commonly known as Lord Lyndhurst's Act, provided, as to marriages between persons within the prohibited degrees of affinity, as follows: 1st, that such marriages, celebrated before the passage of the act, should not be annulled, except in a suit already pending in the ecclesiastical courts; 2d, that such marriages, thereafter celebrated, should be absolutely null and void to all intents and purposes whatever; 3d, that nothing in this act should be construed to extend to Scotland.

The marriage of a widower with the sister of his deceased wife, in England, after this statute, was held to be within the prohibited degrees and utterly void. *The Queen v. Chadwick*, 11 Q. B. 173, 234.

A case afterwards came before the Scotch courts, in which an English citizen married his deceased wife's sister in England; the validity of the marriage was not disputed during her life, and she died before the St. of Will. IV.; and the question was, whether the children of the marriage could inherit his lands in Scotland. The Scotch courts, in a series of very able opinions, held that they could, upon the ground that by the law of England, the marriage, not having been challenged in the lifetime of both parties, could not in any form be declared invalid in England, and the children were legitimate there, and must therefore

be deemed legitimate in Scotland. *Fenton v. Livingstone*, 16 Ct. of Sess. Cas. (2d Series) 104, and 18 ib. 865. The House of Lords, on appeal, reversed that decision, and held that, although the marriage had, by reason of the peculiar rules governing the English courts of temporal and ecclesiastical jurisdiction, become irrevocable there, yet it was always illegal; and that, those rules not being applicable in the Scotch courts, the legitimacy of the children in Scotland depended upon the question whether the marriage was illegal by the law of Scotland. s. c. 3 Macq. 497. The Scotch court thereupon decided that the marriage was illegal, and that the children were incapable of inheriting lands in Scotland. s. c. 23 Ct. of Sess. Cas. (2d Series) 366.

In *Brook v. Brook*, *ubi supra*, a widower and the sister of his deceased wife, being lawfully domiciled in England, while on a temporary visit to Denmark, had a marriage solemnized between them, which was by the laws of Denmark lawful and valid to all intents and purposes whatsoever. In a suit in equity, brought after the death of both parties, to ascertain the rights of the children in their father's property, the House of Lords, in accordance with the opinions of Lords Campbell, Cranworth, St. Leonards, and Wensleydale, and affirming a decree rendered by Vice Chancellor Stuart, assisted by Mr. Justice Cresswell, held that the marriage in Denmark was wholly void by the St. of Will. IV., and that the children of that marriage were bastards.

The decision was put, by the learned judges who concurred in it, upon three different grounds.

The first ground was that the St. of Will. IV. disqualified English subjects everywhere from contracting such a marriage. This ground was taken in the court below, and by Lord St. Leonards in the House of Lords. 3 Sm. & Giff. 522, 525; 9 H. L. Cas. 234-238. But it was expressly disclaimed by Lord Campbell, Lord Cranworth, and Lord Wensleydale, the two former of whom expressed opinions that the statute did not extend to all the colonies, and all three declared that they did not think its purpose was to put an end to such marriages by British subjects throughout the world. 9 H. L. Cas. 214, 222, 240.

The second ground, which was suggested by Mr. Justice Cresswell and Lord Wensleydale only, and is opposed to all the American authorities, was that the case justly fell within the first exception, stated in Story, Conf. § 114, of marriages involving polygamy and incest. 3 Sm. & Giff. 513; 9 H. L. Cas. 241, 245. In view of that position, it may be observed that in an earlier case, in which Lord Wensleydale himself (then Baron Parke) delivered the opinion, a marriage of a widower with his deceased wife's sister, before the St. of Will. IV., was prevented from being made irrevocable by that statute, only by the institution, a week before its passage, of a suit for nullity in the Ecclesiastical Court by the father of the supposed wife; and by the

decision of the Privy Council, that because, if the marriage was not set aside, the birth of a child of the marriage would impose a legal obligation upon the grandfather to maintain the child in the event of its being poor, lame, or impotent, and unable to work, he had, according to the rules of the ecclesiastical courts, a sufficient interest, "although of an extremely minute and contingent character," to support such a suit. *Sherwood v. Ray*, 1 Moore P. C. 353, 401, 402.

The third ground, upon which alone all the law lords agreed, was that the St. of Will. IV. made all future marriages of this kind between English subjects, having their domicile in England, absolutely void, because declared by act of Parliament to be contrary to the law of God, and must therefore be deemed to include such marriages, although solemnized out of the British dominions.

The law of England, as thus declared by its highest legislative and judicial authorities, is certainly presented in a remarkable aspect. 1st. Before the St. of Will. IV., marriages within the prohibited degrees of affinity, if not avoided by a direct suit for the purpose during the lifetime of both parties, had the same effect in England, in every respect, as if wholly valid. 2d. This statute itself made such marriages, already solemnized in England, irrevocably valid there, if no suit to annul them was already pending. 3d. It left such marriages in England, even before the statute, to be declared illegal in the Scotch courts, at least so far as rights in real estate in Scotland were concerned. 4th. According to the opinion of the majority of the law lords, it did not invalidate marriages of English subjects in English colonies, in which a different law of marriage prevailed. 5th. But it did make future marriages of this kind, contracted either in England or in a foreign country, by English subjects domiciled in England, absolutely void, because declared by the British Parliament to be contrary to the law of God.

The judgment proceeds upon the ground that an act of Parliament is not merely an ordinance of man, but a conclusive declaration of the law of God; and the result is that the law of God, as declared by act of Parliament and expounded by the House of Lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure.

The case recalls the saying of Lord Holt, in *London v. Wood*, 12 Mod. 669, 687, 688, that "an act of Parliament can do no wrong, though it may do several things that look pretty odd;" and illustrates the effect of narrow views of policy, of the doctrine of "the omnipotence of Parliament," and of the consequent unfamiliarity with questions of general jurisprudence, upon judges of the greatest vigor of mind, and of the profoundest learning in the municipal law and in the forms and usages of the judicial system of their own country.

Such a decision, upon such reasons, from any tribunal, however eminent, can have no weight in inducing a court, not bound by it as authority, to overrule or disregard its own decisions.



The provision of the Gen. Sts. c. 107, § 25, forbidding the guilty party to a divorce to contract another marriage, during the life of the other party, without leave of this court, on pain of being adjudged guilty of polygamy, does not create a permanent incapacity, like one arising from consanguinity or affinity. It is rather in the nature of the imposition of a penalty, to which it would be difficult to give any extra-territorial operation. *West Cambridge v. Lexington*, 1 Pick. 506, 510, 512; *Clark v. Clark*, 8 Cush. 385, 386. Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another State according to its laws, at least without proof that the parties went into that State and were married there with the intent to evade the provisions of the statutes of this Commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor whether the indictment is in due form. See *Commonwealth v. Putnam*, 1 Pick. 136, 139; *Commonwealth v. Hunt*, 4 Cush. 49.

*New trial ordered.*<sup>1</sup>

## KINNEY v. COMMONWEALTH.

COURT OF APPEALS OF VIRGINIA. 1878.

[Reported 30 Grattan, 858.]

CHRISTIAN, J.<sup>2</sup> The plaintiff in error was indicted in the county court of Augusta County for lewdly associating and cohabiting with Mahala Miller. He was found guilty. . . . The Commonwealth, to sustain the issue on her part, proved to the jury that the defendant, Andrew Kinney, and a certain Mahala Miller, on the 1st day of January, 1877, and from that time to the 27th day of August, 1877, in the county of Augusta and State of Virginia, did live and associate together as man and wife; that said Andrew Kinney is a negro, and said Mahala Miller a white woman, and that in November, 1874, they, as citizens of the State of Virginia, regularly domiciled in the county of Augusta, left their own State for the purpose of being married in the District of Columbia, and in ten days thereafter returned to this State to live, and have since lived together as man and wife in said county of Augusta. The defendant, to sustain the issue on his part, proved that he and the said Mahala Miller were married in the District of Columbia on the 4th day of November, 1874, in accordance with the laws of said district.

<sup>1</sup> *Acc. Scott v. A. G.*, 11 P. D. 128; *Pondsford v. Johnson*, 2 Blatchf. 51; *Phillips v. Madrid*, 83 Me. 205, 22 Atl. 114; *Van Voorhis v. Brintnall*, 86 N. Y. 18; *S. v. Shattuck*, 69 Vt. 403, 38 Atl. 81. *Contra*, *Williams v. Oates*, 5 Ire. L. 535; *Stull's Estate*, 183 Pa. 625, 39 Atl. 16 (but see *Van Storch v. Griffin*, 71 Pa. 240, not cited in the later case); *Pennegar v. S.*, 87 Tenn. 244. And see *Succession of Hernandez*, 46 La. Ann. 962, 15 So. 461. — Ed.

<sup>2</sup> Part of the opinion is omitted. — Ed.

The court . . . instructed the jury as follows: "That the said marriage of the defendant and said Mahala Miller was, under the circumstances proven, but a vain and futile attempt to evade the laws of Virginia, and override her well-known public policy, and is therefore no bar to this prosecution; to which opinion . . . the defendant, by his counsel, excepts." . . .

The sole question submitted by this bill of exceptions for the adjudication of this court is, Whether the alleged marriage celebrated in the District of Columbia, "in accordance with the laws of said district," as certified in the certificate of facts, is a bar to this prosecution? It is conceded that a marriage in this State between a white person and a negro is void. It is not only prohibited by the statute law, but penalties are imposed for its violation. The first section of chapter 105, Code 1873, provides that "all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, shall be absolutely void without any decree of divorce or other legal process." In the same section other marriages prohibited by law therein mentioned, are voidable only; that is, declared to be void only from the time they shall be so declared by decree of divorce or nullity. These are cases of marriages within the prohibited degrees of consanguinity or affinity, or where either party was insane or incapable from physical causes. Such marriages are void when declared to be void by decree of divorce or nullity, or when the parties are convicted under the third section of chapter 192, which denounces certain penalties against marriages of parties within the prescribed degrees of consanguinity or affinity. But marriage between a white person and a negro is declared by statute to be absolutely void without any decree of divorce or other legal process. If, therefore, the marriage had been celebrated in this State between Andrew Kinney, who is a negro, and Mahala Miller, who is a white woman, no matter by what ceremonies or solemnities, such marriage would have been the merest nullity, and the parties must have been regarded, under our laws, as lewdly associating and cohabiting together, and obnoxious to the penalties denounced by our statute against this gross offence.

Does the marriage of the parties in the District of Columbia, where marriages between white persons and negroes are not prohibited, present a bar to this prosecution and put the parties on any different footing when arraigned before our tribunals for a violation of the laws of this State? It is admitted that Andrew Kinney and Mahala Miller had their domicile in Augusta County, in this State; that they remained out of the State only ten days after their marriage, and returned here, and that this county is still their domicile.

It is plain to be gathered from the whole record, if not indeed admitted, that these parties, knowing they could enter into no valid marriage contract in this State, went to the city of Washington for the purpose of evading the statute law of this State; were there

married, and in a few days returned to this State. They never changed nor designed to change their domicile. It was here then; it is here now.

The important question, and one of first impression in this State, is: Does the marriage in the District of Columbia, made *in fraudem legis* of this State, protect the parties in a prosecution in this State for a violation of its penal laws in this most important and vital branch of criminal jurisprudence, affecting the moral well-being and social order of this State? Must the *lex loci contractus* or the *lex domicilii* prevail?

There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. The right to regulate the institution of marriage; to classify the parties and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality, and social order demand, has been exercised by all civilized governments in all ages of the world.

It is insisted, however, by the learned counsel for the plaintiff in error, in the ingenious and able argument which he addressed to this court, that conceding the power of every State and country to pass such laws, yet they never act *extraterritorial*, but must be confined, with rare exceptions, to such marriages as are contracted and consummated within the State where they are prohibited. He invokes for his client in this case the rule laid down by jurists and text-writers, that "a marriage valid where celebrated is good everywhere."

This is undoubtedly the general rule. But there are certain exceptions to this general rule, and while in its application and the affirmance of certain exceptions thereto, there was for a long time much confusion in the authorities and conflict in the cases, I think it may now be affirmed that there are exceptions to this general rule as well established and authoritatively settled as the rule itself.<sup>1</sup> . . .

Whatever conflict of authority there may have been on this subject, it may now be affirmed, since the decision of *Brook v. Brook*, 9 H. L. C. 193, that in England, a marriage prohibited by law in that country, between parties domiciled there, and declared by act of Parliament to be absolutely void, is invalid there no matter where celebrated. In this country the same doctrine is affirmed in North Carolina, Louisiana, and Tennessee. See *Williams v. Oates'* ex'or, 5 Ired. R. 535; *State v. Kennedy*, 76 North Car. 251; *State v. Ross*, 76 North Car. 242; 10 La. Ann. 411, *Dupre v. Boulad's* ex'or.

Whenever the question has arisen in the Southern States, it has been held that a marriage between a white person and a negro, although the marriage be celebrated in a State where such marriages are not

<sup>1</sup> The court here cited Story, Conflict of Laws § 113; *Brook v. Brook*, 9 H. L. C. 193. — Ed.

prohibited, is void in the State of the domicile, and when they go to another State temporarily, and for the purpose of evading the law, and return to their domicile, such marriage is no bar to a criminal prosecution. And such is the law of this State. It is now so declared by statute. See Sess. Acts of 1877-8. The statute, however, was passed after the marriage of the parties in this case. But without such statute, the marriage was a nullity. It was a marriage prohibited and declared "absolutely void." It was contrary to the declared public law, founded upon motives of public policy, — a public policy affirmed for more than a century; and one upon which social order, public morality, and the best interests of both races depend. This unmistakable policy of the legislature, founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriage between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across an imaginary line, bid defiance to the law, by immediately returning and insisting that the marriage celebrated in another State or country should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void. No State will permit its citizens to violate its laws by such evasions. But the law of the domicile will govern in such case, and when they return, they will be subject to all its penalties, as if such marriage had been celebrated within the State whose public law they have set at defiance.

There is one American case which is directly opposed to the principles herein declared, the facts of which are precisely the same as in the case before us. It is the case of *Medway v. Needham*, 16 Mass. R. 157, which was strongly relied on by the learned counsel for the plaintiff in error as authority to govern this case. But I think that case is not supported by authority nor grounded on any sound principles of law. That was the case of a marriage between a white person and a negro. The parties were domiciled in Massachusetts, whose laws at that time prohibited such marriages. They went into Rhode Island, where such marriages were lawful, were there married, and returned to Massachusetts. The Supreme Court of that State held the marriage to be valid, and declared, in an elaborate opinion, that "a marriage which is good by the laws of the country where it is celebrated, is valid in every other country; and although it should appear that the parties went into another State to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will nevertheless be valid in the country in which the parties live."

In commenting on this case, the lord chancellor, in *Brook v. Brook supra* (219), says: "I cannot think it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which

the forms only of celebrating the marriage in the country of celebration and the country of domicile were different; and he took the distinction between cases where the absolute prohibition of marriage is forbidden on motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I, myself, must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another State in which the marriage is not prohibited, to celebrate a marriage forbidden by their own State, and immediately returning to their own State, to insist on their marriage being recognized as lawful."

Lord Cranworth, referring to the same case, said: "I also concur entirely with my noble and learned friend that the American decision of *Medway v. Needham*, cannot be treated as proceeding on sound principles of law.

"The province or State of Massachusetts positively prohibited by its laws, as contrary to public policy, the marriage of a mulatto with a white woman; and on one of the grounds, pointed out by Mr. Story, such a marriage ought certainly to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful."

With such condemnation, from so high a source, of this decision as authority, and when it is opposed by the decisions of our sister Southern States above referred to, and contrary to sound principles of law, I think, though a case exactly in point upon its facts, it can have but little weight in forming our judicial determination of the question before us in this case.

There is another American case also relied on by the counsel for the plaintiff in error for the doctrine that "a marriage valid where celebrated is valid everywhere." It is a Kentucky case, *Stevenson v. Gray*, reported in 17 B. Monr. R. 193. That was a marriage between a nephew and his uncle's wife. Such a marriage was prohibited in Kentucky, but not in Tennessee. The parties went into Tennessee, and were there married and returned to Kentucky. It was held that the marriage was valid in Kentucky. But it is to be noted that such marriages are not declared by the Kentucky statute absolutely void, but voidable only — that is, to be avoided by judgment of a district court or court of quarterly sessions. The reasoning of the judge who delivered the opinion of the court in that case, shows that he treats the case of a marriage voidable only, and not *ipso facto* void. If such marriage has been declared absolutely void by the Kentucky statute, the decision of the court, no doubt, would have been different.

In the seventh edition of Story's *Conflict of Laws*, p. 178, the editor adds a section in which he says: The limitation defined by Lord Campbell, chancellor, in *Brook v. Brook*, is certainly characterized by great moderation and good sense; that while the form of the contract,

the rites and ceremonies proper or indispensable for its due celebration, are to be governed by the laws of the place of the contract or of celebration, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Hence, if the incapacity of the parties is such that no marriage could be solemnized between them . . . and, without changing their domicile, they go into some other country where no such limitation or restriction exists, and there enter into the formal relation with a view to return and dwell in the country in which such marriage is prohibited by positive law, it is but proper to say that a proper self-respect (of the State or government in prohibiting such a marriage) would seem to require that the attempted evasion would not be allowed to prevail.

I have thus considered, at length, the authorities, English and American, on this question, because it is one of first impression in this court, and because it is a question which materially affects public morality, social order, and the best interests of both races. The public policy of this State, in preventing the intercommingling of the races by refusing to legitimate marriages between them, has been illustrated by its legislature for more than a century. Every well-organized society is essentially interested in the existence and harmony and decorum of all its social relations. Marriage, the most elementary and useful of all, must be regulated and controlled by the sovereign power of the State. The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished Southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

Upon the whole case, I am of opinion that the marriage celebrated in the District of Columbia between Andrew Kinney and Mahala Miller, though lawful there, being positively prohibited and declared void by the statutes of this State, is invalid here, and that said marriage was a mere evasion of the laws of this State, and cannot be pleaded in bar of a criminal prosecution here.

If the parties desire to maintain the relations of man and wife, they must change their domicile and go to some State or country where the laws recognize the validity of such marriages.

Upon the whole case, I am of opinion that there is no error in the judgment of the circuit court affirming the judgment of the county court, and that both be affirmed by this court.

The other judges concurred in the opinion of Christian, J.

*Judgment affirmed.*<sup>1</sup>

<sup>1</sup> *Acc. S. v. Tutty*, 41 Fed. 753; *Dupre v. Boulard*, 10 La. Ann. 411; *S. v. Kennedy*, 76 N. C. 251. But see *Pearson v. Pearson*, 51 Cal. 120. — Ed.

DE BAUFFREMONT *v.* DE BAUFFREMONT.

COURT OF PARIS. 1876: COURT OF CASSATION. 1878.

[*Reported Dalloz Jurisprudence*, 1878, II. 1; 1878, I. 201.]

HENRIETTA VALENTINE DE RIQUET, countess of Caraman-Chimay, Belgian by birth, married the Prince de Bauffremont, a French subject. By a judgment of the Civil Tribunal of the Seine, April 7, 1874, rendered upon the petition of Mme. de Bauffremont, and confirmed by a judgment of the Court of Paris, Aug. 1, 1874, a judicial separation was decreed between the spouses. Afterwards, on May 3, 1875, Mme. de Bauffremont became naturalized without her husband's authorization, in the German duchy of Saxe-Altenburg. Then, taking advantage of the German law, which admits divorce, and it would seem considers Catholic spouses judicially separated as divorced, she married, on October 24, 1875, before the officer of civil status at Berlin, the Prince de Bibesco, a Roumanian subject. The Prince de Bauffremont, before the Tribunal of the Seine, began this action to have declared null the marriage and the act of naturalization of which we have spoken. This petition was granted by a judgment of March 10, 1876.<sup>1</sup> The Princess de Bauffremont appealed.

THE COURT. Henrietta Valentine de Riquet, countess of Caraman-Chimay, Belgian by birth, became French according to Article 12 of the Civil Code, by her marriage with the Prince de Bauffremont, a subject of France. Since judicial separation relaxes without destroying the tie of marriage, the judgment of separation pronounced in France upon her demand could not make her lose the nationality which she had acquired; she remained French since she remained the wife of the Prince de Bauffremont. Granting that she is freed from the duties of cohabitation, and that from this relative freedom one may conclude (reserving the right to consider motives and circumstances) that she has the power of choosing a domicile where she pleases, even in a foreign country, it does not follow that she may likewise, of her own will without her husband's authorization, change her nationality. The French law, which has become her statute personal, remains always fixed to her person, and follows her wherever she fixes her residence or her domicile. The necessity of her husband's authorization, except in simple acts of administering her property, is a legal one, as a result of the power with which the husband remains invested after a judicial separation. The change of nationality forms no exception; all the more where, as in this case, the wife attempts it, by favor of a foreign law not her own, as a means of legally changing her judicial separation into a divorce against her husband's will

<sup>1</sup> The judgment of the Tribunal of the Seine, and part of the case involving a mere question of procedure, are omitted. — Ed.

and against the provisions of the law of France. Supposing this foreign naturalization possible, the effect of it would be immediately annulled by the marriage, still existing, which would impose her husband's nationality on her; she would therefore have changed her nationality only to regain at the same moment (at least in the view of the law of France, by which we are governed) that which she had vainly tried to shake off.

If the act of naturalization in question should be regarded as an act of public law which a foreign State, making use of its sovereign rights, is free to accomplish, independently of marital authorization, we must at the same time recognize that the question relative to the personal capacity of the woman, as a married woman, to contract a second marriage before the dissolution of the first, is put beyond the power of her domicile to affect it. No effect can be made on the prior rights of the husband, a third party, by this act of naturalization; which consequently cannot be set up against him, no matter what its regularity and force, by the law of the foreign State, may be in other respects. The French courts cannot consider, either to declare the act valid or null, the reasons of reciprocal respect due between the two sovereignties.

It matters little, in fact, whether this naturalization could regularly take effect either with or without the husband's consent. Even if he had given express authority to his wife, she could not be permitted to invoke the law of the State where she had obtained her new nationality, to avoid the application of the French law, which alone governs the effect of the marriage of its subjects, and declares the tie indissoluble. It is a question of the most solemn and important of contracts, which not only cannot be broken against the will of one of the contracting parties, but never even by the mutual consent of the spouses. The Princess de Bauffremont would vainly have acquired by her own will a foreign nationality; her husband, remaining French, would vainly have given her express authority to do so. The reciprocal character and the indissoluble tie of marriage prevent in both cases that either the wife alone or even both spouses together (which is not the case here) should elude the provisions of public order of the French law which governs them.

For these reasons, the judgment appealed from is amended so far as it declared null the act of naturalization of May 3, 1875, which should only be declared incapable of being set up against the husband; in other respects the judgment is confirmed.

Mme. de Bauffremont appealed.

THE COURT. . . . The judgment appealed from was not called upon to decide, and did not decide, upon the regularity and legal force, in Germany and according to German law, of these acts done at the sole will of the appellant. Taking only the point of view of the French law, which in fact determines the question and is binding on the



parties, it decided that even had she been authorized by her husband, the appellant could not invoke the law of the State where she had obtained a new nationality, by favor of which, transformed from her condition of woman separated from her husband to that of one divorced, she could elude the French law, which alone governs the effect of the marriage of French subjects and declares the tie indissoluble.

Adopting the findings of the judges of first instance, it has also recited that the appellant solicited and obtained this new nationality not to exercise the rights and fulfil the duties which would be hers in establishing her domicile in the State of Saxe-Altenburg, but with the sole purpose of escaping the prohibitions of the French law by contracting a second marriage, and then abandoning the new nationality as soon as it had been acquired.

In deciding in these circumstances that acts thus done in fraud of the French law and in despite of obligations previously contracted in France could not be set up against the Prince de Bauffremont, the judgment appealed from was given in conformity to the principles of the French law on the indissolubility of marriage, and violated no provisions of law as alleged by the appeal.

*Appeal dismissed.*

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PRINCE FREDERICK OF SAYN-WITTGENSTEIN-SAYN v.  
PRINCESS LUDWIG.

REICHSGERICHT. 1880.

[*Reported 2 Entscheidungen des Reichsgerichts, Civilsachen, 145.*]

PRINCE LUDWIG of Sayn-Wittgenstein-Sayn married in the year 1867 Maria Lilienthal, daughter of the banker Lilienthal of Berlin. The marriage was celebrated on December 6, 1867, at Versoix, in the Canton of Geneva, by a civil act, followed in France by a religious marriage. After the death of Prince Ludwig without issue, in 1876, Prince Frederick, his brother, brought this action against the widow in the court at Ehrenbreitstein, praying that the defendant might be enjoined from any longer bearing the title of Princess Sayn-Wittgenstein-Sayn, and from using the coat of arms of the princely family of Wittgenstein.

The plaintiff based his case on the ground that his brother and himself belonged to the high nobility, and to the Prussian peerage, while the defendant was of the lower burgher class; the marriage of his deceased brother with her was therefore a misalliance (*Missheirat*) according to the family laws of the Wittgensteins, as well as according to the doctrines of the German law and of the law of the order of princes. As a result, the defendant did not enter into the rank and

condition of her husband, and had not the right, which depends upon membership in the family, to use the title and the arms.

The defendant maintained that the law of the Canton of Geneva, in which her husband took up his domicile with her after the celebration of the marriage, should be applied.<sup>1</sup>

The defendant was condemned in the Court of First Instance, according to the plaintiff's prayer, and the decision was affirmed by the Appellate Court at Arnsberg. The defendant appealed from this judgment; but the appeal was rejected by the Reichsgericht for the following reasons.

THE COURT. In agreement with the judge of First Instance the Appellate Court held that for the decision of this suit the Swiss law, that is, the existing law of the Canton of Geneva, did not apply, but the German law of the Order of Princes. This application is entirely correct. Whether we should agree with the reasons put forward by the judges below we need not decide; nor need we further examine the appellant's arguments against them, since their application in the present case arises from the special nature of the principles here brought in question, without considering what principles one should regard as fundamental for the decision of questions involving the conflicts of laws with regard to questions of status and family law.

The late husband of the defendant, Prince Ludwig of Sayn-Wittgenstein-Sayn, belonged without doubt to the high nobility of Germany and to the Prussian peerage. For the establishment of his legal relations generally, as for the decision of the question with what person he may contract a marriage having full civil effects, the special principles would be applied which are established in the law of the Order of Princes for the high nobility, the independent provisions of the family law of the Wittgensteins and the common prince-law of Germany. These principles are in their subject and in their historical development not of a territorial but of a personal nature, and determine the decision of the legal rights of peers without regard to their present domicile, even if it be outside Germany. The State of Prussia decrees to the peer, wherever he is domiciled, as part of and along with his peerage, the common German prince-law and the special law of peerage as a personal law. This is a substantial incident of peerage, and neither Article 14 of the German Constitution nor the royal Prussian statutes regulating the legal rights of peers make them dependent on domicile. Even should the foreign State in which a Prussian peer has established his domicile not recognize the special or the common German prince-law as his personal law, the Prussian State cannot refuse this recognition. For the Prussian courts in determining the legal rights of members of the princely family of Sayn-Wittgenstein-Sayn the existing prince-law of that house governs, equally whether the member in question has established his domicile in Germany or in a foreign country. For the decision of the question, what

<sup>1</sup> Only so much of the case as concerns this ground of defence is given. — ED.

were the effects of the marriage contracted by the defendant with her late husband, it therefore seems to be of no importance whether the latter, who at the time of his marriage was a Prussian subject, had his domicile in Geneva or in Prussia. . . .

If inquiry is made, what consequences the marriage of a member of the high nobility with a woman of the burgher class has, there can be no doubt that such a marriage, so far as the ordinary legal presumptions go, is a complete, true marriage. These consequences, however, do not extend to all civil relations; and, in particular, the wife here does not enter into the rank of her husband, but retains her former rank. She does not participate in the privileges of her husband's rank; she is not empowered to use the princely or ducal title and arms as a sign and representation of her husband's rank and position and the appurtenances of a family of the high nobility.

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#### ANONYMOUS.

REICHSGERICHT. 1887.

[Reported 42 *Seuffert's Archiv*, 303.]

PETITION for nullity of marriage. The parties, both German, the husband a Protestant and the wife a Catholic, had been married in Buenos Ayres, where they were temporarily resident, by a German Evangelical minister, the requirements of the Argentine Code not having been complied with.<sup>1</sup>

THE COURT. In the Appellate Court a new ground of complaint was added, that the marriage had not been celebrated in the form required by the law of the place of celebration, namely, Buenos Ayres: the fact being that it had indeed been consecrated by the resident pastor of the German Evangelical congregation, but had not been celebrated directly afterward before the competent Catholic priest. This ground of complaint also was properly rejected by the Court of Appeal. It is, to be sure, laid down by some writers that a marriage contract can be properly completed only in the form prescribed by the law of the place of celebration, (*e. g.* by von Sicherer, *Personenstand und Eheschliessung*, p. 349; von Friedberg, *Kirchenrecht*, 2d ed. § 156, p. 349); but this opinion, although it has become valid for marriages entered into within German territory by a positive enactment in § 41 of the Reichsgesetzes, February 6, 1875, does not agree with the principles of the common law in regard to the local sovereignty of principles of law. According to these the proposition *locus regit actum* is valid also in the case of a marriage contract: this, however, allows according

<sup>1</sup> This short statement of facts is that of the editor. The discussion by the court of the first ground of nullity alleged is omitted. — Ed.

to the prevailing view, which is also adopted by the Reichsgericht (Entsch. i. 323; xiv. 184), not only the application of the form prescribed at the place of the legal action, but at the same time concurrently the form of the law which is otherwise decisive of the action in question. Therefore it is properly assumed that the marriage may be legally contracted either in the form of the place of celebration or in that of the place which is decisive for the personal relations of the man. Von Bar, Internat. Recht, p. 324 ff.; Stobbe, Deutsches Privatr. (2d ed.) I. § 31, p. 222 ff.; Dernburg, Preuss. Privatr. I. § 27; III. § 4, and Pand. I. § 48, p. 106.

This place is (according to the common law of Germany as held by the Reichsgericht, in agreement with the prevailing doctrine) the domicile of the husband. He who will attack as null an actually existing marriage entered into in a foreign country on account of a legal defect of form of celebration must above all things distinctly allege under the sovereignty of what law the husband personally stood at the time of the marriage. In other words, he must aver either where he at that time had his domicile; or if (according to the law specially deciding the question) not residence but nationality should govern the case, then to what State the husband at the time owed allegiance. When, as in the present case, no averments whatever are made upon this point, the judge who has to decide the petition for nullity (who according to sections 568 and 13 of the Code of Procedure is, for married parties who live within the German empire, always the judge of the present domicile of the man, or in case of doubt every judge) has to apply his own law. Here it is applied as the law which is concurrent with the *lex loci actus* in governing questions of form, according to the meaning of the rule *locus regit actum*. As a result of this, the application by the Oberlandesgericht of the law which at the time of the marriage prevailed at Hamburg, was clearly justified; though, it is true, the reason given in the judgment appealed from, — namely, that the judge in the case of suits for nullity of marriage and for divorce must always apply only his own law, — was subject to serious doubt.

Furthermore, the assumption of the Appellate Court that by the marriage of the parties in 1864, in Buenos Ayres, by the resident Evangelical pastor, the requirements of the law then prevailing in Hamburg as to the form of the marriage contract were satisfied, is in agreement with the deciding principles of law. The first point was correctly laid down, that it was sufficient in Hamburg, as a chiefly Protestant State, if a mixed marriage between a Protestant man and a Catholic woman was entered into only in the form of the common German Protestant church law; and further, it is wholly beyond a doubt that according to Protestant church law the validity of the marriage contract is not dependent upon the fact that he was the proper officiating clergyman (which here, by the way, is not alleged), but the marriage by any settled minister was enough. At any rate,

a valid marriage may be celebrated by one who is not deprived of the right to this function by the law of the place of his settlement; and there was no such deprivation by the Argentine law, according to the whole spirit of its provisions on this subject.

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### LHERMITE v. CHOISI.

CIVIL TRIBUNAL OF THE SEINE. 1899.

[Reported 27 *Clunet*, 350.]

THE TRIBUNAL. On the 14th of September, 1889, Charles Alexis Choisi, an adult thirty years of age, married Mrs. Josephine Verheydt-Deveux before a justice of the peace of the parish of Lafayette, in the State of Louisiana; and on the 12th of June, 1895, he had this union celebrated by a religious service at Bay Saint-Louis (America); but this marriage was not preceded in France by the publications required by articles 63 and 170 of the Civil Code. Of this union on April 12, 1890, one daughter was born, Hermance-Augustine, called Lucy. Charles Alexis Choisi died on June 19, 1897, at Pearlington, in the State of Mississippi. His sisters, Mmes. Lhermite and Huau, have brought against his widow an action to have his marriage declared null as clandestine, and consequently to have his daughter excluded from the succession to his mother, Mme. Choisi.

It is not denied that the marriage of Charles Alexis Choisi was celebrated according to the accustomed forms in the country where it took place. The suit for nullity, according to the terms of the demand, was based only on the violation of Article 170 of the Civil Code. Frenchmen may marry abroad on condition of making, in France, the publications prescribed by our Code; it is necessary to discover the punishment for breach of this condition in order to reach the proper solution of this case. The spouses not having fulfilled the condition, are evidently subject to the penalty established by Article 192, that is, a fine in proportion to their fortune; but does it also follow that the marriage is null? In questions of marriage, nullity is not to be declared by implication; hence in the absence of an express provision attaching the penalty of nullity to the failure to observe a formality that does not go to the essence, it is not permissible to annul a contract so solemn. Article 170 provides, it is true, that the marriage shall be valid if it was preceded by publication, but it does not expressly pronounce it null if this condition is not fulfilled, and one cannot infer it by an argument *a contrario*. Consequently the mere omission of publication in France does not cause nullity of a marriage celebrated abroad.

It would not, however, be the same if the spouses, in omitting the publication in France, had the purpose of keeping their union concealed from the eyes of the French public. It appears by the statement

of their case at the hearing that the plaintiffs rely upon this clandestinity; and moreover it alone can give them a cause of action by Article 191, since no text gives collaterals the right to rely on the mere failure to carry out Article 170. Under these conditions it is proper to consider whether the circumstances which preceded, accompanied, and followed the celebration of the marriage in question show on the part of the spouses the fixed intention to perpetrate a fraud on their national law.

It is shown by the documents in the case that Choisi left France in 1884, to establish himself in America, with the consent of his father, who furnished him the money for his journey and continued for several years to send him aid. He found a situation in Louisiana, where he fixed his principal establishment. After that Madame Verheydt-Devenx, with whom he had lived in concubinage at Paris since 1882, came to join him. Furthermore it is proved that Choisi before being married by a public official to Mme. Deveux, in 1889, carried out formalities which show that the intention of marriage had been duly published. He seems to have done the same before the religious ceremony of June 12, 1895. Finally, up to the death of Choisi the spouses had possession of a status that conformed to their act of marriage; and the child, the issue of their union, appears always to have been treated as a legitimate child.

It results from the evidence stated that Choisi certainly did not leave France with the purpose of marriage, to escape the provisions of the French law. At the time of the marriage he had long lived in Louisiana, and had not preserved a domicile in France. His union, surrounded by the formalities required in that country, was not clandestine, and in the eyes of every one gave him at once the quality of legitimate husband of Mme. Verheydt-Deveux. Under these circumstances it is impossible to find that Choisi, who had reached the age when he could marry without his mother's consent, had the fixed intention, in failing to have *actes respectueux* notified, of concealing his marriage from the French public, and of perpetrating a fraud upon his national law; above all, since that law does not pronounce the nullity of a marriage contracted by a son in defiance of the provisions which require *actes respectueux*.

In such a situation the tribunal would commit an inconceivable excess of rigor, in spite of the serious wrongs of Choisi toward his family, if it allowed an action which would do so profound an injury to the status of a young girl, a minor, who has up to this time enjoyed the privileges of a legitimate child.

For these reasons declares Mmes. Lhermite and Huau and their husbands proper parties to sue, but their suit not maintainable; and dismisses the suit with costs.<sup>1</sup>

<sup>1</sup> Acc. 26 Clunet, 1042 (Brussels, 8 Dec. '98). Where a desire to evade the national law is shown, the marriage is invalid. 21 Clunet, 1074 (Austria, 26 Apr. '92); 26 Clunet, 799 (Paris, 3 March, '98). — Ed.

## SECTION IV.

## LEGITIMACY AND ADOPTION.

## SHAW v. GOULD.

HOUSE OF LORDS. 1868.

*[Reported Law Reports, 3 English and Irish Appeals, 55.]*

JOHN WILSON, of Stenson, in the county of Derby, made his will, dated the 27th of February, 1832 (duly executed to pass real estate), and after directing payment of debts, etc., bequeathed to trustees one moiety of his personal estate in trust for his great-niece, Elizabeth Hickson, for her life, and after her death upon certain trusts for the benefit of her child, or children, or issue; and in case she should not have any child or issue, upon trust for his nephew, Ambrose Moore, his executors, etc. He devised his real estate to trustees during the life of his great-niece, Elizabeth Hickson, for her separate use, remainder to the trustees for 500 years, to raise portions for her younger children, and, subject thereto, to the first son of the body of the testator's said great-niece lawfully begotten, and the heirs of his body, etc., remainder to every other son of the body of his said great-niece lawfully begotten, and his heirs successively, etc., remainder to the use of the daughters of Elizabeth Hickson lawfully begotten, as tenants in common in tail, remainder to the use of Ambrose Moore for life, remainder to his first and other sons in tail.

On the 10th of June, 1828, Elizabeth Hickson, being then about sixteen years of age, was induced by the fraud of a person named Buxton, to contract a marriage with him. The marriage was never consummated, and for his fraudulent act Buxton was indicted, and convicted, and sentenced to three years' imprisonment. No formal dissolution of this fraudulently procured marriage ever took place, and in December, 1838, a formal deed of separation was executed by Buxton in consideration of a sum of money then paid to him, and of the grant of an annuity for life. In 1844, a Mr. John Shaw, who was then studying for admission to the English Bar, addressed proposals of marriage to the lady, who, notwithstanding what had passed, still continued to be called Elizabeth Hickson, and his proposals were favorably received, but it was doubted whether any lawful marriage could take place between them until that which had once been solemnized with Buxton was formally dissolved.

Buxton, after undergoing his sentence, had cohabited in the county of Derby with one Sarah Lant. A suit for a divorce on the ground of adultery was, in June, 1844, instituted by Elizabeth Buxton, or Hick-

son, in the Arches Court of Canterbury, but was not persevered with. Negotiations were then opened with Buxton to induce him to go to Scotland for a time necessary to give the Scotch courts jurisdiction in a divorce suit. These negotiations resulted in an agreement that Buxton should go to Scotland, and remain there a certain time. He was to receive £40 for his expenses: in case he should be divorced he was to receive £250 within three months from the death of a person named in the agreement, with interest thereon until that time; this sum "to be forfeited if he gave or caused to be given such information as would be prejudicial to the divorce." He was, on the divorce being pronounced, to receive a farther sum then in the hands of the lady's trustees, to retain his annuity, and if he had to stay in Scotland more than eight weeks he was to receive £5 a week in addition. At the end of November, 1844, Buxton went to Scotland, and took up his residence first at Dumfries, and then at the neighboring village of New Abbey, where he continued until the end of January, 1845. On the 16th of January, 1845, he was served with a summons in a suit for a divorce issued out of the Court of Session, at Edinburgh, at the suit of Elizabeth Buxton. This suit was not prosecuted to a decree, but another was commenced in November, 1845, to which Buxton put in defences that he and his wife were natives of England, that the marriage was English, that the proper domicile of the parties was England, and that the Scotch court had no jurisdiction to pronounce a divorce. The court, however, proceeded with the suit, in which a decree, declaring the marriage dissolved on the ground of adultery, was pronounced in March, 1846.

In June, 1846, John Shaw and Elizabeth Hickson were in due form married in Scotland. Mr. Shaw, instead of returning to England and coming to the English Bar, became an advocate at the Bar of Scotland, and was thenceforth domiciled in that country. He resided in that country up to the time of his death, which happened in September, 1852. Buxton, who had at once returned to England, pre-deceased him by several months. There were three children of this union, the appellants in the present case. Mrs. Shaw died on the 28th of July, 1863.

On the 3rd of July, 1865, the appellants, by their next friend, presented a petition to the Lord Chancellor, praying for maintenance out of the trust funds which had been paid into court under the Trustee Relief Act. On the 14th of March, 1865, Ambrose Moore, and other parties, claiming to be interested in these funds in case the appellants should be declared not entitled to them, presented a petition in the nature of a cross-petition, setting forth their own claims, and denying those of the appellants, alleging that the appellants were not the children lawfully begotten of the said Elizabeth Hickson, for that she still continued the wife of Buxton, the divorce from him having been obtained by collusion, and being in itself invalid for the purpose of dissolving an English marriage.



The two petitions came on together for hearing before Vice-Chancellor Kindersley, who, on the 7th of December, 1865, made an order refusing the petition of the appellants, and directing that the funds in court should be applied for the benefit of the respondents. This was the order appealed against.<sup>1</sup>

LORD CRANWORTH. . . . If the parties in this case had been Scotch, and not English, and if all which occurred had occurred not in England but in Scotland, there would, I presume, have been no question on the subject. If Thomas Buxton, being a domiciled Scotchman, had married in Edinburgh, Elizabeth Hickson, being a domiciled Scotchwoman, and afterwards, while their Scotch domicile continued, she had obtained a decree of divorce in the Court of Session, and then had married John Shaw, the issue of that marriage would certainly have been legitimate. The argument of the appellants is, that the consequence must be the same, though the parties were at the time of the first marriage domiciled in England, and were married there. The question, it is contended, is, whether, when the second marriage was contracted, the parties to it had the capacity to contract marriage; in other words, whether the effect of the divorce was to enable them to enter into a valid contract of marriage, which, but for the divorce, they certainly could not have entered into. The whole, therefore, turns on the validity of the divorce. Now, the law of Scotland seems clear that a residence in Scotland for forty days makes that country the *domicilium fori* of any person so residing in the country, in which, for the purposes of litigation, he is to be treated as being domiciled. And it is assumed that this is true whatever be the nature of the litigation; that it holds equally in cases the decision in which may involve the personal status of those who may claim through the litigant parties; so also where it is a mere dispute between the litigant parties themselves. Taking this, however, to be the undoubted law of Scotland, the question is, whether that principle is one which this country is bound to recognize. I think it is not.

The facts of this case do not raise the question as to what would have been the status of these children if Buxton and Elizabeth Hickson, though married at Manchester, had always been Scotch persons, and had always lived in Scotland; or even what it would have been if, before the proceedings for the divorce, Buxton had actually *bona fide* quitted England permanently, and established himself in Scotland, so as to have acquired a Scotch domicile for all intents and purposes. It may be that in these circumstances the courts of this country would recognize the status of these children, so as to entitle them, after the death of their mother, to the fund given to her children; which no doubt must be construed as meaning her legitimate children. But on that point I express no opinion. . . .

The important differences on the subject of marriage and divorce which exist in the different parts of the United Kingdom often give

<sup>1</sup> Arguments of counsel and parts of the opinions are omitted. — Ed.

rise to perplexing difficulties, and exhibit a state of our law little creditable to us. But these difficulties make it more than usually incumbent on those who have to administer the law to take care that wherever a clear line has been drawn by judicial decision the course which it has marked out should be rigidly followed. Now, whatever be the difficulties in such cases as the present, I think the doctrine that no divorce in Scotland resting merely on a *forum domicilii*, had, at all events before the passing of our English Divorce Act in 1857, any effect in England on the validity of an English marriage, is established on the highest authority. . . .<sup>1</sup>

These cases clearly decide the one now before the House, for if the first marriage here was not dissolved there could not have been a second marriage. Till the first was dissolved there was no capacity to contract a second. If after the second marriage Buxton and Elizabeth had again cohabited, and there had been issue, that issue would certainly have been legitimate by the law of England, and it cannot be argued that the issue of both unions could share together.

The view which I take of this case relieves me from the necessity of considering whether the resort to Scotland for the purpose of the divorce, and the arrangements made among the parties for bringing about that object, were or were not of such a character as to taint the whole of the proceedings with fraud; I am not at all satisfied that they were, but I am glad to be relieved from the necessity of deciding on such a ground.

There is only one farther observation which I decide to make: it is this: In saying that the Scotch courts have no power to dissolve an English marriage where the parties have only gone to Scotland for the purpose of obtaining there a *domicilium fori*, I do not mean to express any opinion as to what might be the effect of a divorce so obtained considered merely as a Scotch question. In the anomalous state of our laws relating to marriage and divorce, it may be that such a proceeding may be valid to the north of the Tweed, but invalid to the south. And I am painfully sensible of the inconveniences which may result from such a state of the law. But it must be for the legislature to set it right. The authorities seem to me to show clearly that whatever may be the just decision of the Scotch courts in such a case as the present, on this subject of divorce according to Scotch law, it is one in which this country cannot admit any right in them to interfere with the inviolability of an English marriage, or with any of its incidents. To do so would be to allow a prejudice to English law to be created by the decisions of what, for this purpose, we must call a foreign law, thus going beyond what, in the passage cited from Huber, any country is called on to do.

On these short grounds I am of opinion that there was no foundation for this appeal, and I move your Lordships that it may be dismissed.

<sup>1</sup> Lord Cranworth here cited *Lolley's Case*, R. & R. 237, 2 Cl. & F. 567; *Conway v Beazley*, 3 Hagg. Ecc. 639; *Dolphin v. Robins*, 7 H. L. C. 390. — Ed.

LORD CHELMSFORD. . . . Whether the appellants answer the descriptions respectively of "son lawfully begotten," and of "children," depends upon whether their parents were lawfully married; and this again depends upon the effect of a divorce in Scotland dissolving the marriage of their mother with Thomas Buxton in England. . . .

Vice-Chancellor Kindersley, in giving his judgment against the validity of marriage, said, "that to assert the validity of the Scotch divorce, upon which alone the validity of the marriage with Shaw depends, is to assert that the Court of Session is not bound by the principle of international law; that all questions as to the validity, or incidents, or consequences of a marriage, are to be decided according to the *lex loci contractus*, i. e., the law of the country where it was solemnized."

But in a suit for a divorce the validity of the marriage is not in question, and the violation of the marriage contract can hardly be called one of the "incidents" or "consequences" of it. If a divorce is to be regarded as a remedy for the breach of the matrimonial contract, it is a general principle of international law that all remedies depend upon the *lex fori*, and not on the *lex loci contractus*.

A question of greater difficulty which has been argued in this case is: What is the effect of a Scotch divorce upon an English marriage, where the married parties do not afterwards become domiciled in Scotland, nor have resorted thither with the design of invoking the jurisdiction of the court, but where, happening to be in the country, one of them applies for and obtains a decree of divorce?

Since the decision in *Lolley's Case* the courts of Scotland have from time to time asserted and exercised a jurisdiction to dissolve marriages which have taken place in England, and elsewhere than in Scotland, where the parties to them had acquired no permanent domicile in that country, but had merely continued there a sufficient time to give the courts jurisdiction. These cases have never been appealed to this House, so as to raise the question of the validity of such divorces in a form to require your Lordships to decide upon the existence of the jurisdiction according to the principles of Scotch law. I cannot, therefore, subscribe to the opinion expressed by my noble and learned friend, Lord Cranworth, in *Dolphin v. Robins*, "that it must be taken now as clearly established that the Scotch court has no power to dissolve an English marriage where the parties are not really domiciled in Scotland."

But whatever opinion may be ultimately entertained as to the extent of the power of the Scotch courts to dissolve English marriages, the validity of the divorce of the appellants' mother from Buxton cannot be admitted, if it was obtained by concert or collusion.<sup>1</sup> . . .

It is possible that the Scotch courts might not have entertained the same view of the question of collusion which I have formed. But even if they had, it appears from the evidence of the Scotch advocates

<sup>1</sup> Lord Chelmsford held the divorce collusive. — Ed.

produced in this case that, according to the law of Scotland, reduction of a decree of divorce upon the ground of collusion cannot be pronounced after a year and a day from the date. I suppose, therefore, that the Scotch courts would sustain the decree of divorce, and would hold the subsequent marriage to be valid if they were brought into question before them. The counsel for the appellants therefore contend that the decree of divorce being irreversible, the marriage of the parents of the appellants was valid, and the status of legitimacy of the appellants being established in Scotland must be recognized everywhere.

They farther argued that, even assuming the marriage to be invalid, the appellants might still be legitimate. They ground this argument upon the law of Scotland, "which" (according to the evidence of the Scotch advocates, to whom I have previously referred), "from considerations of expediency and humanity, adopted the rule of the canon law, which recognized the legitimacy of children born of a putative marriage, — that is, a marriage regular and solemn in point of form, but null in law, because of the existence of an impediment such as the prior existing marriage of one of the parties, both or either of the parties being ignorant of the existence of the prior marriage."

The authority of text writers was referred to upon this point, all of whom confine the ignorance which renders children of a void marriage legitimate to ignorance of some fact by the parents. In the present case there was no fact bearing on the validity of the second marriage unknown to either of the parties to it. They drew their conclusions from known facts, and acted upon their own judgment as to the correctness of the advice given them upon the subject of the decree of divorce. Although they may have proceeded *bona fide* upon this advice, still their case is not brought within the principle of the law as laid down both by the evidence and in the text writers, as the ignorance imputed is not of fact, but of law.

But if a constructive legitimacy of this kind would, under the circumstances, have arisen in Scotland, I cannot think that we could be bound to recognize it so far as to qualify the offspring of a void marriage to take under the description of "children" in an English will.

My opinion in this case is founded entirely upon the peculiar circumstances attending it; the first marriage having taken place in England between parties having an English domicile which they never changed, and the divorce in Scotland having been obtained by preconcerted arrangement, the parties resorting in the Scotch courts for the sole purpose of making it instrumental to the attainment of their objects. If this does not amount to collusion in the sense in which that term appears to have been employed in some cases of this description, I do not think that the tribunals of this country can regard a divorce thus obtained as binding on their judgment. It seems to me that this case cannot be distinguished from that of *Dolphin v. Robins*, 7 H. L. C. 390, decided by your Lordships, where the validity

of a will made in France depended upon the effect of a Scotch divorce upon an English marriage. In that case there was an agreement between the married parties to procure a divorce in Scotland, and the husband was to receive £12,000, which was to be forfeited in case he should by false or insufficient evidence prevent the divorce being obtained (for so I interpret the ambiguous and inaccurate language of the memorandum upon that subject). It was held that a divorce procured by the execution of this preconcerted arrangement was, as Lord Kingsdown expressed it, "mere mockery, and collusion from beginning to end."

In that case the husband was to forfeit the money he was to receive for assisting to procure the divorce "if he should prevent its being obtained by false or insufficient evidence." In the present case Buxton was to forfeit what he was to receive "in case he should give information prejudicial to the divorce." I think the cases exactly resemble one another.

Whatever may be the view of the Scotch courts as to the legitimacy of the appellants, your Lordships are called upon to determine whether they answer a particular description upon principles of English law, and by the rules of construction of an English will. It is clear that the words "son lawfully begotten" and "children" in the will in question can apply only to a legitimate son or to legitimate children, and that the appellants, not having the character of legitimacy according to English law, cannot take under these descriptions.

The decree appealed from must be affirmed.

LORD WESTBURY. My Lords, this case depends on the answer to the question, whether a marriage solemnized in England between two English subjects domiciled in England at the time, can be dissolved by the decree of a foreign tribunal.

According to the institutions of England as existing at the time of the alleged divorce, no such decree could have been obtained in any Court, for no forensic tribunal existed in England with jurisdiction to grant divorces *à vinculo matrimonii*. The foreign decree of divorce is adduced for the purpose of determining a question touching a right of property that has arisen in an English court of justice, and which must be decided by English law. It is therefore a question of English law, and the true inquiry is: Does the English law recognize and admit the finality of a foreign judgment divorcing, *à vinculo matrimonii*, English subjects who were married in England? The foreign decree may be perfectly valid and unimpeachable within the territorial jurisdiction of the judge who pronounced it. It may there fix the legal status of persons and conclude the right and title to property; but it may still not be such a sentence as by the comity of nations (that is, by the general principles of jurisprudence which are recognized by the Christian States of Europe) has an extraterritorial effect and authority.

The first essential for the validity of a foreign decree is, that it should be pronounced by a court of competent jurisdiction between

parties who are *bona fide* subject to that jurisprudence. In the present case two English subjects who had married in England being desirous of obtaining a divorce, crossed the border into Scotland for the purpose of getting it. The wife sued the husband for a divorce in a court which was competent to exercise jurisdiction for such a purpose over those who were subject to it. But could this court, consistently with true principles, assert such jurisdiction over those who were not permanently residing within the limits of its authority? I am not looking at the simulated residence in Scotland with a view to holding the judgment collusive, but with reference to the question whether the Scotch court can justly assert that by such temporary residence it acquired a jurisdiction which the courts of another country ought to recognize and admit. It is perfectly competent to the courts in Scotland to fix a certain amount of residence as the condition for the exercise of its jurisdiction, and if that condition be fulfilled, it may proceed to pronounce a judgment that will be binding within its own borders; but that judgment cannot claim extra-territorial authority unless it be pronounced in accordance with rules of international public law.

The extent and limits of the comity of nations, or of the obligation which one nation is under to receive and admit the judgments of the courts of another country, are well defined in one of the axioms of Huber, who says: "*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.*" But if the court of a foreign country permits the subjects of a bordering nation to resort to it for the purpose only of getting rid of the personal status and obligations of husband and wife, which release they cannot obtain in the courts of their own country, it is plain that such foreign court is in reality, by its tribunals, usurping the rights and functions of sovereignty over the subjects of another country who still retain, and, as soon as the purpose is answered, intend to return to their native country and resume, their original position. Can this be done without injury to the authority of such bordering power and to the rights of its subjects?

Social rights depend in very many cases upon the personal status and relations of individuals; that is to say, upon the relation of husband and wife, father and child, and all the relations which are consequent upon marriage, and if these relations as they exist cannot be altered by the tribunals and domestic law of the country where they were formed, are not the institutions of that country prejudiced, and its subjects injured, by permitting a foreign court to be invoked for the purpose of altering social rights and duties, which cannot be changed under their own laws, in their own courts of justice?

It is true that persons commorant in a foreign country, but without any intention of remaining there, are, whilst they are so commorant, subject to the laws of that country, and must yield obedience to them;

but that is a very different thing from a country permitting foreigners to resort to it for the sole purpose of getting released from the most solemn of all contracts, and the most important social obligations. Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming, and, if necessary, of dissolving the marriage contract.

No nation can be required to admit that its domiciled subjects may lawfully resort to another country for the purpose of evading the laws under which they live. When they return to the country of their domicile, bringing back with them a foreign judgment so obtained, the tribunals of the domicile are entitled, or even bound, to reject such judgment, as having no extraterritorial force or validity. They are entitled to reject it, if pronounced by a tribunal not having competent jurisdiction; and they are *bound* to reject it, if it be an invasion of their own laws and polity.

But this right to reject a foreign sentence of divorce cannot rest on the principle stated by the Vice-Chancellor in his judgment, namely, that where, by the *lex loci contractus*, the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence, that is to say, with those rules which, for the sake of general convenience and by tacit consent, are received by Christian nations and observed in their tribunals. One of these rules certainly is, that questions of personal status depend on the law of actual domicile.

It is said by a foreign jurist of authority, Rodenburg, and his works are cited with approbation by many recent writers, "*Unicum hoc ipsa rei natura ac necessitas inexit, ut cum de statu et conditione hominum queritur, uni solum modo Judici, et quidem Domicilii universum in illa jus sit attributum.*" This position, that *universum jus*, that is, jurisdiction which is complete and ought to be everywhere recognized, does, in all matters touching the personal status or condition of persons, belong to the judge of that country where the persons are domiciled, has been generally recognized.

The language of Boullenois, a French jurist of authority, is to the same effect. His position is, that the laws of a sovereign extend over persons domiciled *within* his territory, and over property which is there situate.

That this rule is one which is introduced by *ipsa rei natura ac necessitas*, is well illustrated and enforced by Lord Brougham, in his judgment in the case of *Warrender v. Warrender*.

If, as is certain, the domicile of origin may be effectually put off, and a new domicile acquired by persons who are *uni juris*, it must follow that such persons thereby become, to all intents and purposes, subject to, and entitled to the benefit of, the laws and institutions of the adopted country, in like manner as they were entitled and subject to the laws of the domicile of origin, and that without becoming aliens in their own native country.

Mr. Justice Story, in his book on the Conflict of Laws, § 205 n., cites a judgment delivered by the Supreme Court of Pennsylvania, in which, after observing that a *bona fide* domicile, in the strictest sense of the word, was essential to jurisdiction to pronounce a divorce *à vinculo matrimonii*, Chief Justice Gibson treats the British tenet of perpetual allegiance as the root of the English doctrine of the indissolubility of the marriage contract. I hardly need observe that this is an unfounded notion, and that the political maxim of *nemo potest exuere patriam*, which preserves the duty of allegiance notwithstanding the change of domicile, has nothing to do with the personal relations and rights of British subjects under civil contracts.

If it were permitted by this House to be supposed that the law of this country was to the effect stated by the Vice-Chancellor, viz., that the *lex loci contractus* enters into and forms part of the marriage contract, so that if, by the law of the country where the marriage is solemnized, and of which the parties are natural-born subjects, no divorce *à vinculo* can be granted, and such marriage is everywhere indissoluble, it would be a conclusion that would lead to the most startling results. Suppose two Roman Catholics, who, having married in Spain, afterwards became Protestants, and are *bona fide* domiciled in this country, where they reside for years, could it be held that the husband was bound by the *lex loci contractus* from seeking a divorce from his wife by reason of adultery committed during such residence? On the other hand suppose two Prussian subjects married at Berlin, where a divorce may be obtained for incompatibility of temper, could they, on becoming domiciled in England, claim a divorce on such a ground before the tribunals of this country, where such a ground of divorce is not judicially recognized? Many other cases might be put, but it is unnecessary to do so, for I apprehend there is no substantial authority for the position. In England, since the Reformation, marriage, being no longer a sacrament, has always, in theory of law, been dissoluble for adultery in the wife, and for incestuous adultery and other crimes by the husband; but until the recent Divorce Act, this law was administered by Parliament alone, and although the decision of Parliament was in the form of an act or *privilegium*, and not of a judicial decree, yet the act was granted upon evidence proving that the case came within the scope of certain established rules. This proceeding was in spirit a judicial, though in form a legislative act. The justice of divorce was recognized, but no forensic tribunal was intrusted with the power of applying the remedy. But the law and practice of Parliament were well known; and, in fact, this House acted as a court of justice. It cannot, therefore, be correctly said, that divorce *à vinculo matrimonii* was contrary to the principles and institutions of this country. It follows that the validity of a foreign decree of divorce must be ascertained in the same manner and on the same rules by which the conclusive effect of other foreign judgments has to be determined.



The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bona fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case*.<sup>1</sup> . . .

It follows that the marriage of Mr. and Mrs. Buxton was legally subsisting at the time of the second marriage between Mrs. Buxton and Mr. Shaw; and that the second marriage was therefore void, and the issue of it cannot claim to be entitled by English law to the benefit of the trust previously declared for the children of Elizabeth Hickson.

But even if the first husband, Mr. Buxton, had been permanently domiciled in Scotland before and at the date of the decree for divorce, in which case the Scotch courts might have had jurisdiction, I should still have been of opinion that the decree was not binding, as having been collusively obtained. But I abstain from resting my judgment upon this ground, because I entertain a doubt whether collusion could be now used as a sufficient reason for setting aside the decree after the deaths of all the parties to the proceeding. . . .

For these reasons I am of opinion that the decree of the Vice-Chancellor was correct, and ought to be affirmed.

LORD COLONSAY. . . . When it is said in unqualified terms that a marriage duly celebrated in England, according to the rites of the English Church, ought to be regarded and treated by the courts of other countries as a contract involving the element of absolute indissolubility as of its essence, and ought not to be under any circumstances dissolved by decree of a foreign court; in short, that a foreign court has no power to dissolve an English marriage; that is a proposition in general or international law, and would require to be maintained by reference to recognized rules of international law, or general principles of jurisprudence. But although the proposition has been introduced into this case it has not been supported by any such reference, and I cannot assent to it as resting on any recognized rule of international law. It appears to me to involve more than one fallacy. It assumes as a basis that absolute indissolubility is an inherent quality of an English marriage, necessarily attaching to it under all circumstances. Then, building on that basis, it assumes that as regards international law the relation of husband and wife stands on the same footing as ordinary business contracts, and, farther, it assumes that the *lex loci contractus* must be the sovereign rule for determining all questions as to the rights, duties, and obligations arising out of that relation, and the remedy or redress to be given in the event of either party acting in violation of the contract.

<sup>1</sup> Lord Westbury examined *Lolley's Case*, 1 Russ. & R. 237; *Warrender v. Warrender*, 2 Cl. & F. 567; *Dolphin v. Robins*, 7 H. L. C. 390. — Ed.

I hold each and all of these assumptions to be more or less erroneous. Is it sound that absolute indissolubility is an inherent quality of marriage when celebrated in England according to the rites of the English Church? Is it so regarded even in England? I have heard no authority for that. . . .

The fallacies that have lurked in undefined notions of the indissolubility of English marriages, and the omnipotence of the *lex loci contractus*, being dislodged, what are the rules by which we should be governed in deciding this case? Assuming in the meantime that the case depends entirely on the reception (so to speak) to be given to the foreign decree of divorce, it is to be observed that the respondents deny that the decree is valid according to the law of the country in which it was pronounced. If we are to go into that inquiry we must deal with it upon the evidence, and the evidence, so far as it goes, is in favor of the validity of the decree. Of course I do not include in the evidence an opinion said to have been given by a witness, not in this cause, and which had due reference to the question of jurisdiction.

I therefore presume that we must deal with the case on the footing that the decree is, or may be, a valid decree of divorce in Scotland. Then why is that decree to have no effect given to it in England? not because the English marriage was absolutely indissoluble; not because the *jus gentium* restrains the courts of one country from dissolving a marriage celebrated in another country, or holds that the *lex loci contractus* is necessarily imported in its totality into whatever country the parties may go to. It must be because the circumstances of this case bring it within some exception recognized in general law, or because the law of England, irrespective of any rules of general law, refuses to give effect to such a decree. The main feature of the case in this view is that the parties, at least Buxton the husband, being a domiciled Englishman, having no connection with Scotland, went there for the purpose of giving to the Scottish court jurisdiction in the suit for divorce at the instance of his wife. I think that the English cases referred to, viz. Lolley's Case and Conway v. Beazley, and the case of Dolphin, are precedents to the effect that the courts of England will not recognize a decree of divorce obtained under such circumstances, and that, sitting in an English court, I am bound to respect these precedents so far as they go; and they may be sufficient for the decision of the present case. At the same time I may be permitted to say, that I am not so clear in my apprehension of the principle of general law on which those decisions proceeded.

It was said that a foreign court has no jurisdiction in the matter of divorce, unless the parties are domiciled in that country; but what is meant by "domicil?" I have observed that it is designated sometimes as a *bona fide* domicil, sometimes as a *real* domicil, sometimes as a *complete* domicil, sometimes as a domicil *for all purposes*. But I must, with deference, hesitate to hold that on general principles of jurisprudence, or rules of international law, the jurisdiction to redress

matrimonial wrongs, including the granting of a decree of divorce *à vinculo*, depends on there being a domicile such as seems to be implied in some of these expressions. Jurisdiction to redress wrongs in regard to domestic relations does not necessarily depend on domicile for all purposes. If the decisions to which I have referred proceeded on the ground that the resort to the foreign country was merely for the temporary purpose of giving to the courts of that country the opportunity of dealing with the case according to their own law, and thereby obtaining a dissolution of the marriage, and that such was the object of both parties, these decisions might be said to derive support from principles of general law, on the ground of being *in fraudem legis*. But if you put the case of parties resorting to Scotland with no such view, and being resident there for a considerable time, though not so as to change the domicile for all purposes, and then suppose that the wife commits adultery in Scotland, and that the husband discovers it, and immediately raises an action of divorce in the court in Scotland where the witnesses reside, and where his own duties detain him, and that he proves his case and obtains a decree, which decree is unquestionably good in Scotland, and would, I believe, be recognized in most other countries, I am slow to think that it would be ignored in England because it had not been pronounced by the Court of Divorce here. How would the Court of Divorce here deal with the converse case? I can figure many phases in which the question of the efficacy of a decree of divorce may present itself, and I am unwilling, in the present case, to go farther than to say that the cases referred to satisfy me that the law of England does not acknowledge the validity of a decree of divorce obtained in the circumstances disclosed in this case.

There is still another point in the case which has raised some doubt in my mind. It is this: Assuming, as we must do, on the evidence, that, according to the law of Scotland, the marriage of the father and mother of the appellants was a valid marriage, and they are children lawfully procreated of that marriage, and so in their own country legitimate from their birth, is that status to be denied to them in this country, on the ground that is here pleaded? I do not question the logic of the reasoning by which the conclusion has been reached, that if there were no valid divorce there was an incapacity to marry, and, consequently, no valid marriage. But there was a valid divorce, and a capacity to marry in the territory, and when that marriage has resulted in the birth of children, who have the status of legitimate children according to the law of their own country, are we in reference to them and their rights to revert to an inquiry, at whatever distance of time, as to whether Buxton's resort to Scotland was, or was not, for the purpose of facilitating the divorce? That has not been directly decided in any of the cases, — not even in the case of Vardill, — but I think the cases tend in that direction so strongly that I cannot, especially after the opinions now delivered, take upon myself to suggest a doubt as to their being the law of England, although I do not see my

way to reconciling it with general principles of jurisprudence, or the generally recognized rules of international law. . . .

The learned judge in the court below refers to the monstrous consequences that would result from recognizing the possibility of a man having two lawful wives, one in England, and another in some other country. But I think he has failed to perceive that such a state of matters would be promoted rather than restricted by the doctrine of absolute indissolubility, and of the supremacy of the *lex loci contractus*, while it would not exist if effect was given to the foreign decree of divorce.

*Order affirmed, and appeal dismissed.*

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### IN RE GROVE.

COURT OF APPEAL. 1888.

[*Reported 40 Chancery Division, 216.*]

**FURTHER CONSIDERATION.** This was an action for the administration of the estate of Caroline Emilia Grove, a domiciled Englishwoman, who died on the 29th of October, 1866, at the age of eighty-eight, a lunatic and intestate, and possessed of considerable personal estate.

In October, 1867, as no next of kin appeared to claim her estate, letters of administration were granted to the Solicitor to the Treasury; and the Treasury shortly afterwards took possession of the estate.

Two sets of persons subsequently set up conflicting claims to the estate as next of kin of the intestate, *i. e.* the Vaucher family and the Falquet family, and this action was brought by a member of the former family in 1884.

In the course of the proceedings an inquiry was directed as to who were the next of kin of the intestate, and evidence was gone into from which it appeared that both the Vaucher family and the Falquet family claimed through the same man, Marc Thomegay, and the same woman, Martha Powis, under the following circumstances:—

Marc Thomegay, who was the grandfather of the intestate, was born in Geneva of Swiss parents, in the year 1712, and there was no question that his domicile of origin was Genevese. On the 13th of August, 1728, he was received as a burgess of Geneva. In 1729, his father, who was a watchmaker, died in Geneva. Marc Thomegay was a worker in gold and silver, and in 1734, being then twenty-two years of age, he came to England, where he remained until his death in 1779. In the year 1743 a private Act of Parliament was passed, whereby Peter Thomegay, the brother of Marc Thomegay, and four other foreigners were naturalized as subjects of Great Britain, but this act did not include and made no mention of Marc Thomegay.

Some time after the arrival of Marc Thomegay in England, he formed a connection with an Englishwoman named Martha Powis; he

cohabited with her, for several years, and had by her three illegitimate children, viz., Sarah, who was born on the 5th of February, 1744, and was baptized on the 24th of the same month by the name of Sarah Thomegay, in the church of St. Mary, Whitechapel, where he presented her under his own name and as his daughter; a son, who was born on the 11th of January, 1745, and was baptized on the 16th of February following, in the same church; and another daughter, who was born on the 14th of November, 1747, and was baptized on the 13th of December following, in the parish church of Barking in Essex. These two children were also baptized under their father's name, and as his children.

Sarah Thomegay, on the 19th of December, 1768, married M. Delom, a citizen of Vevey, and she was the ancestress of the Vaucher family.

Elizabeth Thomegay married a M. Courbel, a citizen of Geneva.

On the 22d of May, 1749, Marc Thomegay was married to an Englishwoman named Elizabeth Woodhouse, in the church of St. Paneras; of this marriage there was issue one child, viz. Margaret Sarah Thomegay, who was born on the 22d of December, 1749, and was baptized on the 13th of January, 1750, in the church of St. Leonard's, Shoreditch. Margaret Sarah Thomegay, on the 13th of June, 1788, married an Englishman named William Grove, and she died in London in the year 1792, having had issue one child only, viz. the intestate Caroline Emilia Grove.

Elizabeth Woodhouse died on the 26th of March, 1752, and on the 2d of February, 1755, Marc Thomegay married Martha Powis, by whom he had formerly had the three illegitimate children above mentioned.

Of this marriage there was issue four children, one of whom died in infancy. The others were Jean, who was born on the 5th of October, 1756, and was baptized on the 29th of the same month in the church of Westham, Essex; Richard, who was born on the 11th of February, 1762, and was baptized on the 1st of March following, in the church of St. Leonard's, Shoreditch; and Sophie Martha, who was born on the 12th of November, 1764, and was baptized on the 7th of December following, in the same church.

Of these three children, Sophie Martha was the only one who left issue, and she in 1791 married Jean Louis Falquet, and was the ancestress of the Falquet family.

Martha Thomegay (*née* Powis) died in the year 1772.

In the year 1774 Marc Thomegay presented a petition to the Council of Geneva, apparently in the interest of his three children by Martha Powis before his marriage with her, in which he stated "that in 1734 he went to England, where he now is, that one of the first ties he formed was an attachment for Miss Martha Powis, whom he intended to marry as soon as fortune would allow him to do so; that thwarted by circumstances and encouraged by their intention to marry one another as soon as those circumstances would permit, they yielded and

lived together for several years as husband and wife; that of this intercourse they had three children." Then after stating the names and dates of the births and baptisms of these children, as above set forth, he stated "that very extraordinary circumstances thwarted the resolution he had formed to marry Martha Powis, and induced him to marry Miss Elizabeth Woodhouse," and stated the death of his wife Elizabeth and his subsequent marriage with Martha Powis. Then the petition stated, *inter alia*, that the petitioner, having been informed that in Geneva, his native country, subsequent marriage legitimized illegitimate-born children, made application in order to prove, by the certificates there mentioned, the births of his son Marc, and his daughters Sarah and Elizabeth, praying the Council to grant him record of his proofs and declarations, so that no one might question to his above-mentioned three children, their condition of legitimate children in Geneva, his native country. An order was made by the Council granting record accordingly, and the births of these three children were entered in the register of births of children of Genevese parents born in foreign parts.

The statements contained in this petition were borne out by the certificates attached thereto, and these certificates were put in evidence in this action.

Marc Thomegay made his will on the 9th of March, 1779, describing himself as of Tottenham, in the county of Middlesex, and died on the 2d of December, 1779. From the will it appeared that he was carrying on business in partnership with his son, and was entitled to a leasehold house, workshops, and premises in Moorfields, within the parish of St. Leonard's, Shoreditch. It did not appear when this lease was granted, but in the baptismal certificates of 1744 and 1745 the parents were described as of Ayliffe Street, and Moorfields was not mentioned in any certificate until the year 1750.

There was evidence that according to the laws of the canton of Geneva illegitimate children are legitimated by the subsequent marriage of their father and mother, notwithstanding the intervening marriage of their father with another woman.

The Chief Clerk, by his certificate made in this action, in substance left to the court the question whether under these circumstances Sarah Delom and the other two children born of Marc Thomegay and Martha Powis during their cohabitation were to be taken as legitimate or not; and found that if Sarah Delom ought to be treated as legitimate, then the next of kin of the intestate were the descendants of the said Sarah Delom, who were represented by the plaintiff, and that if not, such next of kin was the Falquet family.

The further consideration came on for hearing before Mr. Justice STIRLING on the 20th of July, 1887.<sup>1</sup>

The plaintiff appealed [from the judgment of STIRLING, J].

<sup>1</sup> The arguments and the decision of Mr. Justice STIRLING are omitted. — ED.

FRY, L. J.<sup>1</sup> I agree entirely with the conclusion arrived at by the Lord Justice, and I am glad to say that I also agree in the law which he has laid down, but the facts of the case influence my mind somewhat differently, and I pick my way through those facts to the same conclusion by a somewhat different course. I will, therefore, endeavor to state, as briefly as I can, the view I take of this case.

The appellant claims through Sarah Thomegay, who was born in 1744, in this country, and was an illegitimate child of Marc Thomegay and Martha Powis. At birth that child took the domicile of its mother and it took the status of illegitimacy, according to the law of the domicile of its mother, and it took also the capacity to change that status of illegitimacy for one of legitimacy, provided that according to the law of the domicile of the father, the subsequent marriage would work legitimation. The position of such a child, therefore, is curious, taking domicile and status from the mother, but taking the potentiality of changing its status from the putative father. That I take to be the law applicable to this case, and that gives rise to the first question, what was the domicile of the father in the year 1744?

It must be taken that the domicile of the father was Genevese at the date of the birth of Sarah in 1744. If his domicile were English, there would be an end of the case; if the domicile were Genevese, as I hold, then arises the second question, which is this: What was his domicile at the date of the subsequent marriage of the parents in 1755? It appears to me that the domicile governs the effects of the marriage. That I take to be the general law, and it is so laid down by Mr. Justice Story, in the 189th paragraph of his work on Conflict of Laws: "In a general sense the law of the matrimonial domicile is to govern in relation to the incidents and effects of marriage." If, therefore, the subsequent marriage was governed by the English domicile it would seem to follow that no legitimation can take effect. If, on the contrary, the subsequent marriage is governed by Genevese domicile, it would seem that subsequent legitimation does take effect. It may be, though on this point no evidence has been adduced, that the Genevese law would recognize an English marriage as legitimating the previously born issue. Whether that be so or not I do not know, but even if it be, my conclusion is, that we should not follow the Genevese law, if it gave a greater effect to a marriage contract in England when the parents have an English domicile, than the English law gave to it; and for this reason, that the State imposes on all persons domiciled in it, its own conclusions as to the effect of marriage. Here again I would refer to the same paragraph in Mr. Justice Story's Conflict of Laws, where, citing the judgment of Lord Robertson, a Scotch judge, he says: "Marriage is a contract *sui generis*; and the rights, duties, and obligations which arise out of it are matters of such importance to

<sup>1</sup> Concurring opinions of COTTON and LOPES, L.JJ., are omitted. They differed from FRY, L. J., in holding that Thomegay was domiciled in England at the birth of Sarah. Part of the opinion of FRY, L. J., is omitted. — ED.

the well-being of the State, that they are regulated not by the private contract, but by the public laws of the State, which are imperative on all who are domiciled within its territory." I would remark again, that I entirely agree with what has been said by Lord Justice COTTON, with regard to the effect of the cases of *Munro v. Munro*, 7 Cl. & F. 842, and *Udny v. Udny*, Law Rep. 1 H. L. Sc. 441, on this question of law, and I think that they very strongly support the conclusion which I have endeavored to express.

Now, that being so, we come back to the question of fact, where was Marc Thomegay domiciled in 1755 when he contracted marriage with Martha Powis? In my judgment his domicile was English. . . . and that consequently the English law of marriage must govern the effects of the marriage then contracted, and that English law would not allow subsequent legitimation. I come, therefore, to the same conclusion, though by a somewhat different course, as that of my learned brother.

*Appeal dismissed with costs.*<sup>1</sup>

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### SCOTT v. KEY.

SUPREME COURT OF LOUISIANA. 1856.

[Reported 11 Louisiana Annual, 232.]

BUCHANAN, J.<sup>2</sup> This cause has already been before this court, and was remanded to make proper parties defendant. See 9 La. Ann. 213.

Plaintiffs are the surviving brother and sisters of Samuel Estill, deceased, and the children of a deceased brother of said Samuel. They claim to be heirs at law of Samuel Estill. The defendants are the curator, and the half-brothers and sisters, heirs of one William Estill, who was a natural son of Samuel Estill, but legitimated by a statute of the State (then territory) of Arkansas, of which Samuel and William Estill were at the time residents, passed October 27th, 1835, and entitled "an act to legitimize the son of Samuel Estill." For a copy of the said statute in full, see the report of this case in 9th La. Annual.

The question now presented for our decision is, whether the statute in question had an extraterritorial effect, and enabled William Estill to inherit, as the legitimate son of Samuel Estill, the property left by the latter in Louisiana. The solution of this question appertains to a distinction (which has been recognized by various decisions of the Supreme Court of Louisiana) of statutes real and statutes personal. The leading case on this subject is *Saul v. His Creditors*, 5 Mart. n. s., in which it was decided, that the general law of Virginia, which renders

<sup>1</sup> Acc. *Munro v. Munro*, 1 Robt. H. L. 492; *Smith v. Kelly*, 23 Miss. 167; *Miller v. Miller*, 91 N. Y. 315; *Dayton v. Adkisson*, 45 N. J. Eq. 603, 17 Atl. 964. — Ed.

<sup>2</sup> The statement of facts, arguments, and dissenting opinion are omitted. — Ed.



property acquired during marriage the property of the husband, is a real statute, which did not follow a couple, who had contracted marriage in Virginia, into the State of Louisiana, where they resided many years, and where the wife died; but that property acquired in Louisiana after their removal thither, entered into the matrimonial partnership of our law, and on the dissolution of the marriage, belonged one-half to the wife's heirs. And in the case of *Banna v. Alpuente*, 6 Mart. N. S. (the same judge, Porter, who had, in the case of *Saul*, reviewed all the authorities, being the organ of the court), it was decided that the laws of domicile of origin govern the state and condition into whatever country the party removes; in other words, that such laws are personal statutes. And those two decisions are in harmony with the definition by Chief Justice Eustis, of the real and personal statute, in the case of the *Augusta Insurance Company v. Morton*, in 3 La. Ann. 426: "Those laws are real," says the learned judge, "in contradistinction to personal statutes which regulate directly property, without reference to the condition or capacity of its possessor." There are some expressions of Judge Strawbridge, in the case of *Brosnahan v. Turner*, 16 La. 439, which are relied upon by plaintiffs' counsel, and which are scarcely consistent with this definition. But the decision in *Brosnahan v. Turner* turned upon a totally different point, the validity of a sheriff's sale. The remarks in *Brosnahan v. Turner*, as to the incapacity of the testamentary heirs of Villarude to inherit in Louisiana, under a will probated under the authority of a statute of Florida, are at best but *obiter dicta*, and besides refer to a very different state of facts from that presented in this case. Here, an infant, or minor, son of a resident of Arkansas, born out of wedlock, was, by an act of the legislature of the country of his domicile, legitimated, or put upon the same footing as if his parents had been married at the time of his birth.

It is admitted of record, that William Estill, then a small child, October 27, 1835, resided with his natural father, Samuel Estill, in Arkansas, who was then a citizen of Arkansas, and resided in Arkansas, and that both of them resided therein for several years before 1835, and also continued to reside in Arkansas until some time between 1837 and 1841." Arkansas was then the *bona fide* domicile of the Estills, at the time of the passage of the act of the legislature in question. William was, by law, the legitimate son of Samuel in Arkansas. Can it be said that he lost his status by crossing the State line into the frontier parish of Carroll, some years afterwards? We think not. The heritable quality of legitimacy which he had received from the legislature of the State of his residence accompanied him when he changed his domicile.

The error of the judgment appealed from consists in regarding William Estill as illegitimate, at the time of his father's death. But he was not so. The original taint of illegitimacy had been removed by the act of the legislature. Legitimacy and illegitimacy are the result of positive laws, which differ very materially in different countries.

To illustrate this idea, suppose William Estill had been born in Louisiana, and that after his birth his father and mother had got married in Louisiana, and subsequently to their marriage removed with their child to Arkansas. Their marriage after his birth would have legitimated their offspring by the law of their domicile; yet by the law of Arkansas a subsequent marriage would have not produced that effect. Nevertheless, the status of legitimacy being acquired in Louisiana would have accompanied him into Arkansas. There are many precedents, in the legislation of various States of this Union, of legitimation by act of the legislature, and particularly in Louisiana. This seems identical with the legitimation *per rescriptum principis* of the Roman law.

Voet, Commentarius ad Pandectas, lib. 25, tit. 7, §§ 4 and 13.

If it is true that a general law of the place of domicile, changing the status of its citizens according to circumstances, is a personal statute, accompanying the party to every other country, provided the circumstances which operate such change have occurred before the change of domicile, which we consider to be the doctrine settled in Louisiana, *a fortiori*, is a special law, removing a disability from a particular citizen by name, such a statute? The constitutional power of the legislature to enact such exceptional enabling statutes was drawn directly in question, and ruled affirmatively, in the case of *Pritchard v. Citizens Bank*, 8 La. 133. The maxim cited by Story, Conflict of Laws, § 51, from Boullenois, "*Habilis vel inhabilis in loco domicilii, est habilis vel inhabilis in omni loco*," must therefore be deemed law in Louisiana.

And is it not correct to say, that the statute of Arkansas, to legitimate William Estill (which is a personal statute), conflicted with the statute of distributions of Louisiana (which is a real statute); and consequently, as was held in Saul's case, is overruled by the latter statute? By the Louisiana statute of distributions, the legitimate son inherits in preference to the brothers and sisters of the deceased. By the effect of the statute of Arkansas, William Estill was the legitimate son of Samuel Estill. Upon the demise of Samuel Estill in Louisiana, in 1849, fourteen years after that statute, William Estill, as his legitimate son, was his heir, by the law of Louisiana.

In confirmation of this view of the subject, we may quote the language of the High Court of Errors and Appeals of Mississippi, in the case of *Smith v. Kelly*, 23 Miss. Rep., 170: "It is a well settled principle, that the status or condition, as to the legitimacy, must be determined by reference to the law of the country where such status or condition had its origin."

Judgment of the District Court reversed; and judgment for defendants, with costs in both cases.

SPOFFORD, J. It was competent for the legislature of Arkansas, the domicile of its origin, to fix the status of William Estill.

In substance and effect, that legislature gave him the *status* of a legitimate son of Samuel Estill.

The Arkansas statute, legitimating William Estill, was a personal statute.

Therefore, the status of a legitimate son of Samuel Estill would accompany William Estill into whatever country he might go.

He came hither with the status. He inherited, by our law, from his father, Samuel Estill, because he was to all intents and purposes a legitimate son, having become so by the law of the domicile of his origin, and not in fraud of our law, nor in violation of its policy.

I, therefore, concur in the opinion and judgment of Mr. Justice BUCHANAN.

MERRICK, C. J., dissenting.

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BARNUM c. BARNUM.

COURT OF APPEALS OF MARYLAND. 1875.

[*Reported 42 Maryland, 251.*]

THIS was a bill for the distribution of the property of David Barnum. John R. Barnum claimed a distributive share as grandson of David and son of Richard Barnum. John R. Barnum was born in Arkansas, while his father was domiciled there; the court, however, decided, that his parents were not married, and that he was illegitimate. He having died during the progress of the suit, his representative appealed.<sup>1</sup>

ALVEY, J. It is contended that notwithstanding there may have been no marriage between Dr. Barnum and Caroline Butler, yet by the operation of the act of the legislature of Arkansas, before referred to, John R. Barnum was rendered legitimate, as if a valid marriage had taken place, and was therefore capable of taking whatever right that would or could devolve on any legitimate child of his father; that the act was retroactive, and related back to the time of the birth of the child declared to be heir.

In this, however, we do not agree with the counsel of the claimants. As we have seen, the act makes no reference to any marriage, and in no sense could operate to confirm any defective or imperfect marriage. Its operation does not even depend upon the fact that John R. Barnum was the child of Richard Barnum. It simply, by force of the law itself, and not of the circumstances of birth or relationship, gave to John R. Barnum a personal status, with capacity to inherit from Richard Barnum as heir. This act could have no extraterritorial operation whatever, except as to any rights that may have been acquired under it, in the State of Arkansas. As to such rights they would be respected everywhere. *Sto. Confl. L.*, § § 101, 102. But as to capacity to acquire property beyond the State passing the act, by virtue of the particular status given the party, that the legislature could not confer. Even if the act had professed to legitimate John R. Barnum, without

<sup>1</sup> This short statement is substituted for that of the reporter. Only so much of the opinion as discusses the legitimacy of John R. Barnum is given. — *ED.*

reference to previous marriage, it could have no operation here, and no rights involved in this case could be affected by it. This would seem to be clear both on reason and authority. 5 Com. Dig. Parliament (K), p. 301; *Birtwhistle v. Vardill*, 5 B. & Cr., 438; *Houlditch v. Marquess of Donegall*, 2 Clark & Finn., 476; *Smith v. Derr's Adm'rs*, 34 Penn. St., 126; *Sto. Confl. L.*, §§ 87, 87 *a*.

The claim, therefore made in the right of John R. Barnum, must be rejected.<sup>1</sup>

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## ROSS v. ROSS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1880.

[Reported 129 *Massachusetts*, 243.]

GRAY, C. J.<sup>2</sup> This case presents for adjudication the question which it was attempted to raise in *Ross v. Ross*, 123 Mass. 212, namely, whether a child adopted, with the sanction of a judicial decree, and with the consent of his father, by another person, in a State where the parties at the time have their domicile, under statutes substantially similar to our own, and which, like ours, give a child so adopted the same rights of succession and inheritance as legitimate offspring in the estate of the person adopting him, is entitled, after the adopting parent and the adopted child have removed their domicile into this Commonwealth, to inherit the real estate of such parent in this Commonwealth upon his dying here intestate.

The question how far a child, adopted according to law in the State of the domicile, can inherit lands in another State, was mentioned by Lord Brougham in *Doe v. Vardill*, 7 Cl. & Fin, 895, 898, and by Chief Justice Lowrie in *Smith v. Derr*, 34 Penn. St. 126, 128, but, so far as we are informed, has never been adjudged. It must therefore be determined upon a consideration of general principles of jurisprudence, and of the judicial application of those principles in analogous cases.

As a general rule, when no rights of creditors intervene, the succession and disposition of personal property are regulated by the law of the owner's domicile. It is often said, as in *Cutter v. Davenport*, 1 Pick. 81, 86, cited by the tenent, to be a settled principle, that "the title to and the disposition of real estate must be exclusively regulated by the law of the place in which it is situated." But so general a statement, without explanation, is liable to mislead. The question in that case was of the validity of an assignment of a mortgage of real estate; and there is no doubt that by our law the validity, as well as the form, of any instrument of transfer of real estate, whether a deed or a will, is to be determined by the *lex rei sitæ*. *Goddard v. Sawyer*,

<sup>1</sup> *Acc. Lingen v. Lingen*, 45 Ala. 410. — Ed.

<sup>2</sup> Part of the opinion only is given. — Ed.

9 Allen, 78; *Sedgwick v. Latlin*, 10 Allen, 430, 433; *United States v. Crosby*, 7 Cranch, 115; *Clark v. Graham*, 6 Wheat. 577; *Kerr v. Moon*, 9 Wheat. 565; *McCormick v. Sullivan*, 10 Wheat. 192.

It is a general principle, that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and that this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is indeed to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but, in either case, it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status.

The capacity or qualification to inherit or succeed to property, which is an incident of the status or condition, requiring no action to give it effect, is to be distinguished from the capacity or competency to enter into contracts that confer rights upon others. A capacity to take and have differs from a capacity to do and contract; in short, a capacity of holding from a capacity to act. Generally speaking, the validity of a personal contract, even as regards the capacity of the party to make it, as in the case of a married woman or an infant, is to be determined by the law of the State in which it is made. *Milliken v. Pratt*, 125 Mass. 374, and authorities cited.<sup>1</sup>

The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the law of England or of Scotland, but was recognized by the Roman law, and exists in many countries on the continent of Europe which derive their jurisprudence from that law. *Co. Lit.* 7 b, 237 b; 4 *Phillimore*, § 531; *Mackenzie's Roman Law*, 120-124; *Whart. Conf.* § 251. It was long ago introduced, from the law of France or of Spain, into Louisiana and Texas, and more recently, at various times and by different statutes, throughout New England, and in New York, New Jersey, Pennsylvania, and a large proportion of the other States of the Union. *Fuselier v. Masse*, 4 La. 423; *Vidal v. Commagère*, 13 La. Ann. 516; *Teal v. Sevier*, 26 Tex. 516; *Miss. St.* 1846; *Hutch. Miss. Code*, 501; *Alabama Code of 1852*, § 2011; *N. Y. St.* 1873, c. 830;

<sup>1</sup> The court, in omitted portions of the opinion, cited and discussed at length the following cases, among others: *Doe v. Vardill*, 2 Cl. & F. 571; *Shedden v. Patrick*, 5 Paton, 194, 1 Macq. 535; *Strathmore Peerage*, 6 Paton, 645; *Rose v. Ross*, 4 Wils. & Sh. 289; *Don's Estate*, 4 Drewry, 194; *Skottowe v. Young*, L. R. 11 Eq. 474; *Loring v. Thorndike*, 5 All. 257; *Smith v. Kelly*, 23 Miss. 167; *Scott v. Key*, 11 La. Ann. 232; *Barnum v. Barnum*, 42 Md. 251; *Smith v. Derr*, 34 Pa. St. 126; *Harvey v. Ball*, 32 Ind. 98; *Lingen v. Lingen*, 45 Ala. 410; *Com. v. Nancrede*, 32 Pa. St. 389; *Shafer v. Eneu*, 54 Pa. St. 304. — Ed.

N. J. Rev. Sts. of 1877, § 1345 ; Penn St. 1855, *e.* 456 ; Purd. Dig. 61 ; 1 Southern Law Rev. (N. S.) 70, 79 and note, citing statutes of other States. One of the first, if not the very first, of the States whose jurisprudence is based exclusively on the common law, to introduce it, was Massachusetts. . . .

The statute of Pennsylvania of 1855, which is made part of the case stated, and under which the demandant was adopted by the intestate in 1871, while both were domiciled in that State, corresponds to these statutes of this Commonwealth in most respects. Like them, it permits any inhabitant of the State to petition for leave to adopt a child ; it requires the petition to be presented to a court in the county where the petitioner resides ; it requires the consent of the parents or surviving parent of the child ; it authorizes the court, upon being satisfied that it is fit and proper that such adoption should take effect, to decree that the child shall assume the name, and have all the rights and duties of a child and heir, of the adopting parent ; and it makes the record of that decree evidence of that fact.

The statute of Pennsylvania differs from our own only in not requiring the consent of the petitioner's wife, and of the child if more than fourteen years of age ; in omitting the words " as if born in lawful wedlock " in defining the effect of the adoption ; in also omitting any exception to the adopted child's capacity of inheriting from the adopting parent ; and in expressly providing that, if the adopting parent has other children, the adopted child shall share the inheritance with them in case of intestacy, and he and they shall inherit through each other as if all had been lawful children of the same parent. . . .

The law of the domicile of the parties is generally the rule which governs the creation of the status of a child by adoption. *Foster v. Waterman*, 124 Mass. 592 ; 4 Phillimore, § 531 ; *Whart. Conf.* § 251. The status of the demandant, as adopted child of the intestate, in the State in which both were domiciled at the time of the adoption, was acquired in substantially the same manner, and was precisely the same so far as concerned his relation to, and his capacity to inherit the estate of, the adopting father, as that which he might have acquired in this Commonwealth had the parties been then domiciled here. In this respect, there is no conflict between the laws of the two Commonwealths. The difference between them in regard to the consent of the wife of the adopting father, and to the inheritance of estates limited to heirs of the body, or inheritance from the kindred, or through the children, of such father, are not material to this case, in which the only question is whether the adopted child or a brother of the adopting father has the better title to land in the absolute ownership of such father at the time of his death. Whatever effect the want of formal consent, on the part of the wife of the intestate, to the adoption of the demandant, might have, if she were claiming any interest in her husband's estate, it can have no bearing upon this controversy between the adopted child and a collateral heir.

The tenant in his argument laid much stress on the words of the statute of descents and of the statutes of adoption of this Commonwealth.

The statute of descents which was in force at the time of the death of the intestate in 1873 enacts that when a person dies intestate, seised of any real estate, it shall descend, subject to his debts, and saving rights of homestead, "in the manner following: First. In equal shares to his children, and to the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants," etc. "Second. If he leaves no issue, then to his father. Third. If he leaves no issue nor father, then in equal shares to his mother, brothers, and sisters," etc. "Eighth. If the intestate leaves a widow and no kindred, his estate shall descend to his widow; and if the intestate is a married woman and leaves no kindred, her estate shall descend to her husband. Ninth. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to the Commonwealth." Gen. Sts. c. 91, § 1. See also St. 1876, c. 220.

But this section must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child, or a widow, or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere. The words "children" and "child," for instance, in the first clause, "issue," in the phrase "if he leaves no issue," in subsequent clauses, and "kindred," in the last two clauses of this section, clearly include a child made legitimate by the marriage of its parents and acknowledgment by the father after its birth under § 4 of the same chapter, or a child adopted under the provisions of c. 110 of the General Statutes, or c. 310 of the Statutes of 1871.

These statutes, after providing how a child may be adopted in this Commonwealth with the sanction of a decree of the Probate Court in the county in which the adopting parent resides (or, under the St. of 1871, in the county where the child resides if the adopting parent is not an inhabitant of this Commonwealth), enact that a child "so adopted" shall be deemed, for the purpose of inheritance, and other legal consequences of the natural relation of parent and child, to be the child of the parent by adoption. St. 1851, c. 324, § 6; Gen. Sts. c. 110, § 7; St. 1871, c. 310, § 8. It is argued that the words "so adopted" imply that children otherwise adopted are incapable of inheriting lands in this Commonwealth. But it appears to us that these words, in the connection in which they stand, warrant no such implication; and that the legislature, throughout these statutes, had solely in view adoption by or of inhabitants of this Commonwealth, and did not intend either to regulate the manner, or to define the effects, of adoption by and of inhabitants of other States according to the law of their domicile.

We are not aware of any case, in England or America, in which a change of status in the country of the domicile, with the formalities prescribed by its laws, has not been allowed full effect, as to the capacity thereby created of succeeding to and inheriting property, real as well as personal, in any other country the laws of which allow a like change of status in a like manner with a like effect under like circumstances.

We are therefore of opinion that the legal status of child of the intestate, once acquired by the demandant under a statute and by a judicial decree of the State of Pennsylvania, while the parties were domiciled there, continued after their removal into this Commonwealth, and that by virtue thereof the demandant is entitled to maintain this action.

It is worthy of mention (although it cannot of course affect the rights of inheritance which had absolutely vested on the death of the intestate; *Tirrel v. Bacon*, 3 Fed. Rep. 62) that by a recent statute of this Commonwealth "any inhabitant of any other State, adopted as a child in accordance with the laws thereof, shall, upon proof of such fact, be entitled in this Commonwealth to the same rights, as regards succession to property, as he would have enjoyed in the State where such act of adoption was executed, except in so far as they conflict with the provisions of this act." St. 1876, c. 213, § 11.

*Judgment for the demandant.*<sup>1</sup>

## BLYTHE v. AYRES.

SUPREME COURT OF CALIFORNIA. 1892.

[*Reported 96 California, 532.*]

GAROUTTE, J.<sup>2</sup> This is an action instituted under section 1664 of the Code of Civil Procedure by the plaintiff, a minor, through her guardian, to determine the heirship and title to the estate of Thomas H. Blythe, deceased. . . . Plaintiff's claim is based upon sections 230 and 1387, respectively, of the Civil Code of California. Section 230 reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Section 1387, as far as it pertains to the matters involved in this litigation, provides: "Every illegitimate child is an heir of the

<sup>1</sup> *Acc. Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628; *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596; *Melvin v. Martin*, 18 R. I. 650, 30 Atl. 467. And see *Estate of Sunderland*, 60 Ia. 732, 13 N. W. 655. — Ed.

<sup>2</sup> Part of the opinion is omitted. — Ed.



person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." . . .

The facts found by the court which face us while we are engaged in a consideration of the first branch of this subject may be succinctly and substantially stated as follows: (1) That plaintiff was born in England, upon December 18, 1873, and was the issue of Thomas H. Blythe and Julia Perry; (2) that Julia Perry was a native of England, domiciled therein, and continued to there reside until one month after the death of said Blythe; (3) that plaintiff remained in England until after the death of Blythe, when she came to California, and said Blythe was never at any time within any of the countries of Europe after the 29th day of August, 1873; (4) that said Blythe was a citizen of the United States and of the State of California, domiciled in said State, and died intestate therein April 4, 1883, leaving surviving him no wife, no father, no mother, and no child, save and except said Florence Blythe, the plaintiff herein; (5) that said Thomas H. Blythe and said Julia Perry never were married, and said plaintiff was begotten while said Blythe was temporarily sojourning in England, and was born after said Blythe's return to California, and that said Blythe never was married.

Before passing to the merits of the discussion, we pause a moment to say that the verb "adopts," as used in section 230, is used in the sense of "legitimates," and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists. (See law dictionaries, — Bouvier's, Black's, Anderson's, and Rapalje's.) This is the distinguishing feature between adoption and legitimation, as recognized by all the standard law writers of the day who have written upon the subject; and, for the reason that the text writers and the decisions of courts to which we shall look for light and counsel treat the subject as a question of legitimation, we shall view the matter from that standpoint.

The section is broad in its terms. It contains no limitations or conditions, and, to the extent of the power vested in the legislature of the State, applies to all illegitimates, wherever located, and wherever born. The legislature has not seen fit to make any exception to its operation, and, as was said by Taney, C. J., in *Brewer v. Blougher*, 14 Pet. 178, when considering a quite similar provision of a statute: "In the case before us the words are general, and include all persons who come within the description of illegitimate children; . . . and when the legislature speaks in general terms of children of that description, without making any exceptions, we are bound to suppose they design to include the whole class." Bar, in his work on International Law (page 434), says: "Legitimation of bastards, either by subsequent marriage or by an act of the government (*rescriptum principis*), is nothing but a legal equalization of certain children illegitimately begotten with

legitimate children." In other words, the object and effect of section 230 is to change the status and capacity of an illegitimate child to the status and capacity of a child born in lawful wedlock. . . .

The contention of appellants that the status of a person residing in a foreign country, and a subject thereof, cannot be changed by acts performed in California under a provision of the law of our State legislature, cannot be supported as a rule without many exceptions, and to the extent of those exceptions a State law must be held, by its own courts at least, to have extraterritorial operation; and this principle of the foreign operation of State laws even goes to the extent that in many instances such laws are recognized and given effect by the courts of that particular foreign jurisdiction. The doctrine of extraterritorial operation of State laws is fully exemplified in the case of *Hoyt v. Thompson*, 5 N. Y. 340. . . .

Section 215 of the Civil Code is as follows: "A child born before wedlock becomes legitimate by the subsequent marriage of its parents." This section takes a wide range. Its operation is not confined within State lines. It is as general as language can make it. Oceans furnish no obstruction to the effect of its wise and beneficent provisions; it is manna to the bastards of the world. If Blythe, subsequent to the birth of plaintiff, had returned to England, and married Julia Perry, such marriage, under the provision of law just quoted, *ipso facto* would have resulted in the legitimation of Florence Blythe. Then, in answer to the interrogatory of appellants already noticed, we say that she was so domiciled that by the laws of California she could have been changed from bastardy to legitimacy. Our statute, conjoined with principles of international law, would have changed her bastardy to legitimacy in the world at large; and regardless of international law, and regardless of all law of foreign countries, our statute law alone would have made her legitimate in the world at large, whenever and however that question should present itself in the courts of California. And we also have here a most striking illustration of the extraterritorial operation of California law. We have the effect of a statute of this State attaching to a state of facts where the mother and child were never in California, but residing and domiciled in England, and the marriage taking place in England; and California law, as stated, has the effect upon that child to give it a different domicile, and completely change its status. Such would not only be the effect of this law upon the child viewed by California courts, but such would be its effect viewed by the courts of England, where the child was domiciled, and that, too, notwithstanding no provisions of law are there found for the legitimation of bastards. This assumption of Blythe's marriage to Julia Perry, in its facts, forms an exact photograph of the celebrated case of *Munro v. Munro*, found in 1 Rob. App. 492; a case crystallizing the judicial thought of the age upon the subject, and commanding the respect of all writers and judges upon the law of domicile. . . .

Appellants insist that the domicile of the child irrevocably fixes that child's status. In this case, subsequent to the child's birth, Julia Perry

married a domiciled Englishman; hence her domicile was permanently established in England, and for that reason the child's domicile, being the mother's domicile, was permanently established there. Under appellants' reasoning this state of facts would forever debar the child from legitimation, for even its presence in California would avail nothing as against its English domicile. If such be good law, section 226 of the Civil Code, expressly authorizing the adoption of minors of other States, is bad law, for it is squarely in conflict with those views. . . .

We have quoted thus extensively from the authorities upon the subject of domicile as specially bearing upon the question of *legitimation per subsequens matrimonium* for the reason that we are unable to perceive any difference in the general principles of law bearing upon that character of legitimation and in those principles bearing upon other forms of legitimation authorized by the same statute. The only distinction claimed by appellants is that legitimation founded upon subsequent marriage is based upon the fiction of law that a previous consent existed, and the marriage related back to that time. Upon this point it would seem all-sufficient to say that our statute does not recognize such a fiction, and its effective operation in no wise depends upon the assumption of its presence. Times are not what they once were, and we live in an age too practical to build our law upon the unstable foundation of fictions. . . .

Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this State authorize and encourage it, and there is no principle upon which California law and policy, when invoked in California courts, shall be made to surrender to the antagonistic law and policy of Great Britain. . . .

Plaintiff was the child of Blythe, who was a domiciled citizen of the State of California. She founds her claim upon the statutes of this State, and is now here invoking the jurisdiction of the courts of this State. It is a question of California law, to be construed in California courts, and we see nothing in our constitution or statutory law, or in international law, to have prevented Blythe from making the plaintiff his daughter in every sense that the word implies. In conclusion, we hold that Blythe, being domiciled in the State of California both at the time of the birth of plaintiff and at the time he performed the acts which it is claimed resulted in the legitimation of plaintiff, and California law authorizing the legitimation of bastards by the doing of certain acts, it follows that Florence Blythe, the plaintiff, at all times was possessed of a capacity for legitimation under section 230 of the Civil Code of this State.<sup>1</sup>

<sup>1</sup> Upon an examination of the evidence, the learned judge decided that Blythe had done all things required by § 230 to legitimate his daughter. PATERSON and SHARR-STEIN, JJ., concurred. McFARLAND and DE HAVEN, JJ., held that the acts required for legitimation under § 230 had not taken place, but concurred in the result on the ground that plaintiff was heir under § 1387. BLATTY, C. J., and HARRISON, J., did not sit. — ED.

## EDDIE v. EDDIE.

SUPREME COURT OF NORTH DAKOTA. 1899.

[Reported 79 *Northwestern Reporter*, 856.]

YOUNG, J.<sup>1</sup> This is a contest between the two sets of children of one Henrick Nickolai Eddie, deceased, to determine the right of succession to his estate. Eddie, the decedent, died in Grand Forks County October 9, 1896, without will, and possessed of considerable property, both personal and real, situated in that county. Henrick Ferdinand Eddie and Axel Eddie, who are plaintiffs herein, are the natural children of decedent. The defendants are his children by marriage, and are legitimate. The entire contest is as to the right of these natural children to share in the estate of their father by inheritance, under the laws of this State. . . .

The undisputed facts which are pertinent to the issues are these: Henrick Nickolai Eddie, the decedent, was born in the kingdom of Norway in 1843, near Levanger, where he resided continuously until 1869, when he came to the United States, where he lived thereafter and up to the time of his death. Prior to coming to this country, he cohabitated with one Sarah Rinnan, who also lived at Levanger. The plaintiffs are the issue of this intercourse: Henrick Ferdinand Eddie, born in 1861, and Axel Eddie, born in 1865. Both of these children lived with their mother up to the time of her death, which occurred about twenty years ago, and have always resided in Norway. There is no claim that their parents were ever married. After coming to this country, and in 1871, at La Crosse, Wis., Henrick Nickolai Eddie, the decedent, married Oleaana Gorden. The defendants are the issue of that marriage. After leaving Norway, in 1869, decedent never saw or communicated with the plaintiffs or their mother in any way. Neither did he ever acknowledge these children as his own by written instrument. The plaintiffs base their right to inherit upon a claim that they were adopted by their father, and thereby became legitimated, and, as a result, became his heirs under the laws of this State. The material facts upon which the claim of adoption rests are found in the seventh finding of fact of the district court, which is as follows: "That during all the time after the birth of each of said plaintiffs, and up to the date of the immigration of said Henrick Nickolai Eddie to the United States of America, said Henrick Nickolai Eddie treated each of these plaintiffs as if he were a legitimate child of him, said Henrick Nickolai Eddie; that during said time he furnished support and maintenance to each of said children and to their said mother; that during said time he corrected and reprovved said children; that during said time he lived a portion of the time with the said children and their said

<sup>1</sup> Part of the opinion is omitted. — ED.

mother at Levanger, aforesaid; that during all of said time the said Henrick Nickolai Eddie publicly acknowledged each of said children, Henrick Ferdinand and Axel Eddie, as his own." The district court, in its conclusions of law, found that plaintiffs were adopted by decedent as his own children, by his acts, prior to 1869, and that they were his heirs at law, and as such entitled to participate in the distribution of his estate. It will be noticed that all of the acts of the decedent which it is contended amount to an adoption of plaintiffs occurred in Norway, when he and plaintiffs and their mother were all residents of that kingdom. There is nothing in the record to show what the law of Norway is, or that there is any legal authority in that country for the legitimating or adoption of bastard children. Neither is it at all material, for appellants do not claim to have been legitimated and given the capacity to inherit by the laws of their own country, but rest their alleged status of legitimated children and claim to inheritable blood solely upon the laws of this State, where their father resided at his death, and where the estate is situated. It is contended that the acts of recognition by their father which occurred in Norway prior to the year 1869, which are set out in the finding of fact before quoted, legitimized and made them heirs under section 2806, Rev. Codes, which reads as follows: "The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it was a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." The district court reached the conclusion that there had been an adoption, and consequent legitimation, under this statute. Accepting the facts found by that court as true, we are yet not able to reach the same result. It is agreed that the laws of this State regulating the descent and distribution of property govern this estate. This follows necessarily from an application of the rule that personal property descends according to the law of domicile of the owner, and real estate under the law of the place where situated, for in this case both the real and personal property, as well as the domicile of the owner, were within this State. Comity between States has not gone to the extent of recognizing the right of one State to designate the persons to whom realty situate in another State shall descend, and doubtless never will. Another principle which is as universally recognized is that the laws of each State fix the status of the persons domiciled therein. This was expressed in *Ross v. Ross*, 129 Mass. 243, as follows: "It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in every State so far as they are not inconsistent with its own laws and policy." We

may also say that the domicile of an illegitimate child is that of its mother until it acquires one for itself, and that these claimants were, therefore, at all times domiciled in the kingdom of Norway. It is apparent that the rights of claimants are determined by the construction to be given to section 2806, Rev. Codes, upon which they rely. Is it a statute of descent or a statute fixing status? If it is a statute of descent, merely descriptive of a class of illegitimates who are thereby authorized to inherit property situated in this jurisdiction, the fact that claimants were domiciled beyond the confines of the State, and in a foreign land, will deprive them of no rights which the State may have given to them in the estate of the intestate. But, on the other hand, if it is construed as a statute of adoption, creating for those domiciled within the State a status of legitimacy between the illegitimate and its father, in all things like the adoption of another child save in the procedure, and followed by the same legal consequences, both to parent and child, then there can be no pretence that the acts which were all done without the jurisdiction, and in a foreign State, would be a compliance with the section quoted so as to constitute an adoption as so construed; for neither father, mother, children, nor property were in the State or territory when the acts of adoption are said to have occurred. Their own land attached to their status the stigma of illegitimacy. While so domiciled, it was not within the power of another State to remove it. But this absence of power to make or alter the status of the subjects of another State implies no restriction upon the right of the State to control the descent of real estate within its limits, and to lend the aid of its laws to convey their respective interests therein to such classes of persons as it may have designated as heirs, regardless of where they may be domiciled, or the status which they may have. Chapter 8 of the Civil Code, in which the section of the statute is found through which the plaintiffs claim a right to inherit, is composed of ten sections. The first seven sections provide for the adoption, by any adult person, of minor children other than his or her own, by a decree of the district court of the county of the residence of the adopting parent. The eighth fixes the status of the child so adopted as that of one born in lawful wedlock. The following section provides that the decree shall deprive its natural parents of all legal rights respecting it, and frees the adopted child from the obligations of obedience and maintenance to its natural parents. The chapter is concluded by the section in question, which is as strictly a statute of adoption as those preceding. By the former, one may adopt only the child of another, and then, by a decree of court, entered in the public records. By the latter the father is permitted to adopt his own child, not by public proceedings, and by written document containing and perpetuating the record of his child's disgrace, and his own shame, but by voluntarily assuming the usual relation and duties of a father; or, as expressed in the statute, "publicly acknowledging it as his own, receiving it as such with the consent of his wife,

if he is married, into his family, and otherwise treating it as if it were a legitimate child." The adoption in fact is made an adoption in law, and the statute serves the same purpose as the decree, "and such child is thereupon deemed for all purposes legitimate from the time of its birth." In short, all of the mutual rights and duties of parent and child are called into being, placing upon the father the legal obligation of care, education, and support, and giving to him the custody of the child, as well as a right to its earnings; while the child so adopted becomes bound to perform all of the duties of a legitimate child. The status thus created is that of a child adopted by regular procedure of court. Section 2802 of this chapter by its language expressly limits the right of adoption by application to the district court to inhabitants of the State. While it is true, the father of an illegitimate child is not required to pursue the same steps to legally adopt his own child, yet, in view of the fact that the same status is created, and the same mutual and legal obligations between the adopting parent and his child result, the conclusion is irresistible that this section also only applies to parents who are domiciled within the State at the time the adoption in fact occurs. This view is in accord with the holding of the Supreme Court of California, where this same statute has been in force since 1873. See *Blythe v. Ayres*, 96 Cal. 532. One of the legal consequences resulting from the status so created is the right to inherit, but this right does not arise from the mere act of adoption, but is elsewhere expressly given to one who has been so adopted. . . . In this case both the petitioners and their father were domiciled in Norway when the acts of adoption are said to have occurred. Such acts did not, therefore, affect their status in this State. The petitioners were not adopted under the laws of this State, and are therefore not entitled to inherit under section 3744, Rev. Codes. The judgment of the district court is therefore reversed. All concur.

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### SKOTTOWE v. FERRAND.

COURT OF CASSATION, FRANCE. 1857.

[*Reported Journal du Palais*, 1858, 106.]

THE COURT. The judgment from which appeal was taken recited that Thomas Skottowe [Skottowe] was born an Englishman, was never naturalized in France, and has always preserved his quality as Englishman; but it also recited that said Skottowe lived in France for a great number of years, married there twice successively, and had there his domicile after his second marriage with Sylvine Morland, a Frenchwoman, which was celebrated at la Ferté St. Aubin, October 26, 1853. After this marriage he recognized two natural children he had by her, in France, in 1851 and 1852.

English legislation and decisions (supposing them opposed to the legitimization of natural children by the subsequent marriage of the parents) in case of a marriage celebrated in France, when the father alone is English, domiciled in France, the mother French and the children born in France, could not deprive this woman of the right (which she derived from the French law, the law of the matrimonial domicile to which the intending spouses are supposed to have wished to submit themselves) to legitimate her children by her marriage with their father, or deprive the children of the benefit of this legitimization.

This tacit agreement of the future spouses at the time when they were to be united in marriage should produce, in France, complete and indivisible effects as well concerning the father as concerning the mother and children; otherwise it would not be a true legitimization. The good faith of the mother would be defrauded, as well as the hopes which, in consenting to the marriage, she had reposed in her country's laws, for herself as well as for her children; who, born in France, may, in spite of the recognition by their father in the marriage contract, claim at their majority the quality of French citizens, according to Article 9 of the Code Napoléon.

These considerations of fact and law have all the greater force and power because, — according to its object and its results, which are to repair a fault committed against social order, for the benefit of the natural child who was the innocent victim of it, to create for this child a family that he did not have before, and to raise him to the class and give him the rights of legitimate child, — legitimization by subsequent marriage of the parents, like marriage itself, is in France a question of public order.

It follows that in deciding that Skottowe has not conferred upon his two natural children, born in France in 1851 and 1852, by his subsequent marriage with their mother celebrated in France October 26, 1853, the benefit of legitimization, and that accordingly the gift *inter vivos* made by him to Mrs. Farrand, July 4, 1836, was not revoked and should be executed, the judgment from which appeal was taken expressly violates Articles 331 and 960 of the Code Napoléon.

*Judgment set aside.*<sup>1</sup>

<sup>1</sup> Acc. Joly v. Perkins (Rouen, 1887), 14 Clunet, 183. See Skottowe v. Young, L. R. 11 Eq. 474. — Ed.



## ANONYMOUS.

COURT OF APPEAL, ATHENS. 1893.

[*Reported 21 Clunet, 592.*]

THE COURT. The recognition of a natural child by a Greek in foreign parts is not governed by the laws of the country where the recognition takes place, but by the law of the father's country. The application of the French law, made in the court below according to Article 4 of the Greek Civil Code because the mother was French, is not in conformity with law; for in the recognition it is the father who contracts the relation from which are deduced all the rights of the recognized child. The validity of the recognition made by a Greek in a foreign country should be judged in the same way as if the act had been done in Greece; in short, according to the Greek Civil Code, Article 4: "Marriage and the relations between parents and children are ruled for a Greek residing in a foreign country by the Hellenic law." This solution is also in conformity with the general rule that paternity and filiation are governed by the statute personal (or by the principle of nationality) of the father; this rule is accepted by all nations in the world. The principles we have laid down are professed by very eminent authors (Foelix, *Droit intern.* I. p. 79; Pasquale Fiore, *Droit international privé*, p. 239; von Bar, *Internationales Privatrecht*. II. p. 183).

If recognition were not an institution existing in Greece, a Greek could not make a recognition even in a foreign country, since, according to Article 8 of the Greek Civil Code, the Greek courts cannot take account of institutions which are not admitted by Greek law. According to this solution are the English decisions, which provide that an Englishman cannot recognize a natural child even in a foreign country, whilst a foreigner may recognize a natural child in England provided he can do it by the law of his country. Recognition is not met with in the Roman law, but it is admitted in principle by the modern Greek law (Greek Civil Code, Art. 65). The proof of foreign laws, when they are denied, is obligatory upon the court; consequently the court of first instance, in deciding that it might order the proof of foreign law, if it deemed it necessary, but that it was not bound to do so, falsely interpreted the law of procedure.

The recognized child is French, since before the recognition she married a Frenchman: the French nationality thus acquired cannot be lost by effect of the recognition which without the marriage would have made the child Greek.

The recognition of the plaintiff is to be regarded legal if the act of recognition which she alleges was done in conformity with the French law at Toulon. It is true that the validity of the recognition and the capacity of the father are judged by the Hellenic law; but the external

forms of recognition are governed by the law of the country where the recognition takes place (Greek Civil Code, Art. 60, where is found the special rule that acts of civil status recorded in a foreign country by competent magistrates according to the forms in use in that country may be effectually proved).

For the rights of inheritance of the recognized child it is necessary to turn to the law which regulates intestate succession to a Greek citizen; now according to Article 5 of the Greek Civil Code, testamentary or intestate succession is regulated by the law of the nation of the deceased, and consequently we must apply Greek law as well for the capacity of the heir as for the extent of his right. The Hellenic law does not regulate the rights of a recognized child to his father's property; one cannot apply the provisions as to legitimated children, because legitimation has for its purpose to make a legitimate child of a natural child, while recognition simply constitutes a *vinculum juris* between father and child. Besides, if recognition gave the recognized child all the rights of a legitimate child, the provisions for legitimation would be superfluous. All modern legislation governing the rights of recognized children has given them not the same rights of succession as those of legitimate or legitimated children, but narrower ones. For this reason the rights of succession of recognized children should be regulated according to the dispositions of the Roman and Byzantine law relative to *liberi naturales (ex concubina)*, in the strict sense of the word). According to the Novels, 18 cap. V. and 89 cap. XII., infants born of a concubine succeed in default of legitimate children, either with their mother or alone to the sixth part of their father's goods. These provisions have not been in force since Leo, Emperor of Byzantium, abrogated concubinage as a legal union; but though the provisions are abrogated for children born of a concubine, they remain in full force for recognized children, since the modern legislator in 1856 had the intention (which was not, to be sure, expressly formulated in the law) of applying the provisions to natural children.<sup>1</sup>

<sup>1</sup> Acc. 16 Clunet, 676 (Marseilles, 26 Jan. '89). — Ed.

## CHAPTER VII.

## RIGHTS OF PROPERTY.

## SECTION I.

## THE NATURE OF PROPERTY.

## DUNCAN v. LAWSON.

CHANCERY DIVISION. 1889.

[Reported 41 *Chancery Division*, 394.]

KAY, J.<sup>1</sup> The opinion of the court is required by the Court of Session in Scotland, which has approved and remitted to this court a case under the Act 22 & 23 Vict. c. 63. Upon several of the matters submitted no doubt can be entertained. One question of considerable interest has been argued.

The question arises under a Scotch will — more properly a trust disposition and settlement — of David Gavin Hewit. He was a domiciled Scotchman, and possessed freehold and leasehold estate in England. He gave all his real and personal property to trustees, with power to convert, and directed them to pay certain pecuniary legacies to charities in England and Scotland. And he disposed of the ultimate residue of his trust estate, on failure of his issue, among certain specified charities.

The validity of these gifts, so far as they are payable out of the proceeds of English freehold or leasehold property, must depend on the *lex loci rei sitæ*, which in England renders charitable gifts by will of real or leasehold property void. The contest arises upon the question who are to take the English property which would have gone to satisfy these bequests. The pecuniary legacies in an English will so framed would, so far as they failed, fall into and increase the residue. The gifts of residue, so far as they failed, would be undisposed of and devolve as upon an intestacy. This, as all the residue is divided among charities, would not alter the quantity of property undisposed of.

There is no doubt as to the devolution of the English freeholds so far as undisposed of by the will. These, or the proceeds of any converted under the will, would descend as real estate, and would belong

<sup>1</sup> The opinion only is given. — Ed.

to the testator's heir-at-law at the time of his death, assuming that the testator had acquired them as a purchaser and not by inheritance. See 3 & 4 Will. IV. c. 106.

The question which has been argued is whether the next of kin of the testator according to English or Scotch law are entitled to the undisposed of leaseholds or the proceeds thereof. *Mobilia sequuntur personam*; and the law of the domicile undoubtedly regulates succession to movable property; but the reason for this is that movables have no locality in law. It is argued that the leaseholds undisposed of, although *immobilia*, belong to the executor, who would be bound to deal with the beneficial interest in them as with other undisposed of personal estate, treating them as personal property by the *lex loci*, and therefore dealing with the beneficial interest in *mobilia* and these *immobilia* in the same way; and that accordingly the beneficial interest must devolve according to the law of the domicile. But the *lex loci* governs the devolution of *immobilia* in case of intestacy, just as it does of freehold property. There is no possibility of doubt that, if the Scotch heir and the English heir were different persons, the English heir and not the Scotch heir would take the undisposed of freeholds in England. The executor is merely the hand to effect the distribution of personal estate. As to the persons entitled under the distribution to succeed to the undisposed of leaseholds, the *lex loci* must govern, or it would practically have no effect at all. The matter is more clear if you take the case of an absolute intestacy, where no executor has been appointed. As to English leaseholds, the Probate Court in England would in that case be called on to appoint an administrator. No doubt such administrator would be chosen from the next of kin according to English law, and it would be his duty, subject to the satisfaction of the testator's debts, probate duty, and the like, to distribute the leaseholds among the persons entitled. At this stage of the proceeding the *lex loci* must determine, independently of the testator's domicile, to whom such distribution must be made.

Such authority as there is upon the subject is in favor of this view. In *Freke v. Lord Carbery*, Law Rep. 16 Eq. 461, 466, where an Irish testator bequeathed, amongst other property, a leasehold house in London upon trust to accumulate the rents, Lord Selborne held that the Thellusson Act applied, although it is not operative in Ireland.<sup>1</sup> In answer to the argument that, according to the *lex loci*, leaseholds in London are personal estate, and therefore come within the rule *mobilia sequuntur personam*, Lord Selborne said: "When '*mobilia*' are in places other than that of the person to whom they belong, their accidental situs is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immovable and not movable. The doctrine is inapplicable to it."

<sup>1</sup> *Contra*, *Despard v. Churchill*, 53 N. Y. 192. — Ed.

In the *Goods of Gentili*, I. R. 9 Eq. 541, a married woman domiciled in Italy died there possessed of leaseholds in Ireland. Her husband, who survived her, was only entitled by Italian law to a limited interest in these leaseholds, but by the law of Ireland, the *lex loci*, he was entitled absolutely. It was held that the grant of administration should be unqualified. In the very lucid and able judgment in that case, Freke *v.* Lord Carbery is referred to as a distinct authority "that the succession to chattels real depended on the *lex loci*," which the learned judge states to be his own opinion also.

His Lordship then answered in detail the several questions propounded for the opinion of the court, and expressed the opinion that the persons entitled to take the sums which would have gone to satisfy the charitable bequests, so far as they were payable out of English freehold and leasehold estates, if such bequests had not been invalid, were, as to the leasehold property or the proceeds thereof, the persons entitled to the testator's personal estate according to the English Statute of Distributions.<sup>1</sup>

## MCCOLLUM v. SMITH.

SUPREME COURT OF TENNESSEE. 1838.

[Reported Meigs, 342.]

GREEN, J.<sup>2</sup> The complainants, Zilla and Sally, are the children of the defendant, by his former wife Tamsey. Tamsey was the daughter of John Dodd, of Louisiana, who died in that State, possessed of considerable estate, about the first of December, 1815. Mrs. Smith and her husband, the defendant, lived in Tennessee, where she died in February, 1816, before any measures were taken to obtain her share of her father's estate. Her only children surviving her were the complainant, Zilla, wife of McCollum, and Sally, wife of Reid, and William Salsbury, a son by a former husband. William Salsbury died in November, 1826, without lawful issue, leaving his sisters, Zilla and Sally, his only heirs and distributees. The defendant, Smith, obtained his wife's portion of her father's estate in Louisiana, and was guardian of William Salsbury, whose estate went into his hands. This bill is brought by his daughters and their husbands for an account of each of these funds. The principal question in this cause is, whether negroes are to be regarded in Louisiana as real estate or personal. For it is not disputed on either side, but that if personal, the law of Mrs. Smith's domicile will govern; and if real, the law of the place where it was situated will control the succession. Story, Conf. L., §§ 481, 483.

By the law of Louisiana, real estate and immovable things are con-

<sup>1</sup> *Acc. Monteith v. Monteith*, 9 Sess. Cas. (4th Series) 982. — Ed.

<sup>2</sup> Part of the opinion only is given. — Ed.

vertible terms. Dig. 1808, b. 2, c. 2, art. 13. And that law, art. 19, contains the following provision in relation to slaves: "Slaves in this territory are considered immovable by the operation of law, on account of their value and utility for the cultivation of the lands, and therefore they may be mortgaged." The chapter from which this extract is made treats only of immovable things, enumerating what are such and in what sense; whether by their nature, or by operation, or destination of law; and commences with the words, "Real estate or immovable things are," etc., thereby substituting the terms, "immovable things," for "real estate." Story's Conf. L., § 447, says, "That in addition to those things which may be deemed universally to partake of the nature of immovables, or, as the common law phrase is, to savor of the realty, all other things, though movable in their nature, which by the local law are deemed immovables, are in like manner governed by the local law. For every nation, having authority to prescribe rules for the disposition and arrangement of all property within its own territory, may impress upon it any character which it shall choose, and no other nation can impugn or vary that character." If these principles be correct, they settle the question; for Louisiana has said, by its law, that slaves are immovable, and having a right to impress upon them any character it may choose, which Tennessee has no right to impugn or vary, it follows that the law of Louisiana must govern the succession.

It is earnestly argued that this language of Judge Story must be restricted in its meaning to such things, movable in their nature, as are by law attached to the land, and are thus made to savor of the realty. This is plainly a misconstruction of the author; for he says, expressly, that in addition to the things that are universally considered to savor of the realty, "all other things, though movable in their nature, which by the local law are deemed immovables, are in like manner governed by the local law;" thus plainly intending to assert the power of a nation to impress any description of property with the character of "immovable," whether connected with land or not.

But it is insisted that no State has a right to do this: and thus give to property, movable in its nature, a destination different from that which by the law of nations would be given to it were there no such local law. If this argument be well founded, the power by law to attach movable property to the freehold, and thus constitute a part of it, would be equally beyond the competency of a State. Is it not as easy to declare, in an act of assembly, that horses for the plow shall constitute part of the freehold, and thus make them immovable, as to announce simply that horses shall be immovable property? It is certainly difficult to perceive upon what principle the competency to enact the former provision can be maintained, while the power to make the latter is denied. And yet the power to attach, by law, things in their nature movable to the freehold, and thus make them immovable, is not denied in the argument; and, indeed, could not be, for the common law, as well as the civil law, recognizes some things movable in their nature

as part of the freehold. This right to impress upon movable things the character of immovables does not depend upon their relation to the freehold, but results from the power inherent in every nation "to prescribe rules for the disposition and arrangement of all property within its own territory." When this shall be done the law applicable to immovables governs the disposition which must be made of such property.

It is insisted that the law of Louisiana referred to was not made with a view to the succession, but that, as only immovables are there subject to mortgage, slaves, on account of their value, were impressed with the character of immovable with the view only of making it lawful to mortgage them. This is evidently a misconstruction of the law. It is true that, after announcing that slaves are immovable property, it is added in the digest of 1808, "and therefore they may be mortgaged." But this is stated as a mere consequence, or incident, resulting from the character with which the property had been impressed by law. The chapter is not treating of mortgage or securities, but of the character of property, defining what things are immovable in contradistinction to movable things. To put it beyond doubt that such is the true construction of this article, it will be perceived by reference to the Civil Code of Louisiana of 1825, b. 2, tit. 1, c. 2, art. 461, that the words "and therefore they may be mortgaged," are omitted altogether. The language of that article is: "Slaves, though movable by their nature, are considered as immovables by operation of law." Thus we have a legislative construction of the article in question, removing all doubt.

These principles having been established, let us apply them to the case under consideration. We have seen that John Dodd died in Louisiana in 1815. His daughter, Tamsey, wife of the defendant Smith, him surviving, then resided in Tennessee, where she died in 1816. In relation to immovable property, the descent and heirship is exclusively governed by the law of the country within which it is actually situate. "No person can take except those who are recognized as legitimate heirs by the laws of that country; and they take in the proportions and order which these laws prescribe." "This," says Judge Story, "is the indisputable doctrine of the common law." Conf. L., § 483. By the law of Louisiana, Dig. Civ. Code, b. 3, tit. 1, c. 2, § 2, art. 27, p. 150, when a man dies all his legitimate children "participate to his succession by equal shares."

John Dodd had five children, of whom Mrs. Smith was one, so that she became entitled to one fifth of all her father's estate. This vested in her as paraphernal property; and as the law of Louisiana governs, as to the land and negroes, being immovables, that portion of the estate was held by her independently of her husband, of which she had the administration and enjoyment. Civil Code La. 331. This property remained undisposed of and undivided, until after the death of Mrs. Smith in 1816. Upon her death, by the law of Louisiana, the succession to all her property in that State is participated by her children. But as that law governs only as to the immovable, Story, Conf. L.,

§ 483, the defendant, her husband, as administrator of her estate in Tennessee, is entitled to her movable effects; and is not bound to account for them to her children. Story, Conf. L., § 481.<sup>1</sup>

MESSIMY *v.* THE REGISTRY.

COURT OF CASSATION, FRANCE. 1887.

[*Reported Pandectes Françaises*, 1887 (6th Part), 12.]

By the terms of a deed executed before Maitre Bagiensky, notary at St. Petersburg, on October 10, 1881, certain Russians after making the declarations required by the appendix to Article 7 for the government of mines with a view of obtaining the concession of certain petroleum-bearing lands in the Province of Bakou, formed under the name of "The Naphtha Company of the Caucasus," a company to take the possession, usufruct, and disposition of the lands conceded, for the purpose of developing petroleum wells, selling the products, and acquiring the usufruct or the title, by purchase, lease, or governmental concession, of other petroleum-bearing lands.

By a procès-verbal of November 29, 1881, at Lyons, recorded with the records of Maitre Messimy, notary, on December 10 following, an anonymous joint-stock association, under the title of "Company for the Production of Naphtha and Petroleum in the Caucasus," was formed. This company by votes of November 6, 1881, recorded with Maitre Messimy, received as assets, 1st, from the Naphtha Company of the Caucasus, the concession of petroleum-bearing lands in the Province of Bakou, the property of that company; 2d, from one Himof, the exclusive right to develop for thirty years certain petroleum-bearing lands near Bog-Boga.

In consideration of these conveyances, the Company for the Production of Naphtha and Petroleum in the Caucasus assigned to the Naphtha Company of the Caucasus 6311 shares, fully paid, of 500 francs each, and paid 3,155,500 francs in cash. For the same consideration Himof received 689 shares and 344,500 francs in cash.

After the registration of the articles of association of the French company there was imposed, in addition to the duty levied on the twenty-five million capital of the company, a duty of two per cent, as on a transfer of movables, on the total amount of 3,500,000 francs paid to the Naphtha Company of the Caucasus and to Himof, representing their conveyances.<sup>2</sup> . . . Maitre Messimy contests the legality of this assessment, on the ground, 1st, that the money value of the conveyances from the Naphtha Company of the Caucasus is not subject to

<sup>1</sup> *Acc. Ex parte Rucker*, 3 Dea. & Ch. 704. But see *Williamson v. Smart*, C. & N. 146. — ED.

<sup>2</sup> Only so much of the case as deals with this duty is given. — ED.



the duty due on sale of movables (two per cent), but to the duty of one-tenth of one per cent, the thing conveyed being an immovable. . . .

The Tribunal of Lyons gave the following judgment: "The question is, to determine the nature of the duty, and for that purpose, the movable or immovable nature of the thing conveyed. The provisions by which the legislature indicates what goods should be regarded as movables and what as immovables are real laws. French real laws govern exclusively things situated in French territory, whoever be the owners, and have no application to things situated outside the territory. This principle shows that when Article 4 of the law of August 23, 1871, designates foreign movable securities as submitted to a tax, it designates not movable securities situated abroad and considered movables in France, but foreign securities which are movables according to the statute which governs them. If the transfer by onerous title, by the concessionary of a mine, of all his rights in the concession is the transfer of a right to immovables, when the mine is situated in French territory, it is a result of the juridical nature given to mines by Article 8 of the law of April 21, 1810, which is a real statute, without application outside the territory. The conveyance made by the Naphtha Company of the Caucasus to the Company for the Production consists of the concession of petroleum-bearing lands situated in the Russian Empire, a concession obtained from the Russian government on the basis of declarations made by representatives of the Company, in conformity with Article 7 of the Regulations for Mines; the movable or immovable character is therefore determined by the Russian law and not by the French. The concession of petroleum-bearing lands of the Caucasus is governed by the Russian law of February 1, 1872, so far as the determination of the rights of the concessionaries is concerned. By the terms of Articles 7, 20, and 21 of this law the petroleum-bearing lands are conceded for the development of the wells, and the concessionaries acquire the right of using while the State retains ownership in the lands. This right is a movable right, and creates a movable security for the benefit of the concessionary. The foregoing applies also to the conveyance of Himof, all the more that the conveyance expressly consists only of the exclusive right to develop for thirty years certain petroleum-bearing land. Article 4 of the law of August 23, 1871, § 2, subjects to the proportional duty transfers, whether gratuitous or for value, when they take effect in France, of foreign public funds, shares, obligations, interests in partnerships, credits, and generally of all foreign securities of whatsoever nature. The law makes no distinction between corporeal and incorporeal movables; it is not confined to movables possessed by foreigners domiciled in France, whether with or without authorization." . . .

An appeal was taken from this judgment to the court of Cassation by Maitre Messimy. . . .

THE COURT. . . . Immovables are governed by the law of the country in which they are situated. The question of knowing whether cer-

tain property is movable or immovable can be determined only by the law of the country where it is found. This principle is applicable not only in civil but also in fiscal matters. Therefore, in considering as movables, by application of the Russian law, of concessions in mines situated in Russia, the judgment appealed from made a just application of the statute real, and violated none of the provisions of law invoked by the appellant.

*Appeal dismissed.*

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## SECTION II.

### IMMOVABLES.

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## CLARK v. GRAHAM.

SUPREME COURT OF THE UNITED STATES. 1821.

[*Reported 6 Wheaton, 577.*]

TODD, J. This is an action of ejectment brought in the Circuit Court for the District of Ohio. At the trial, the plaintiff proved a title sufficient in law, *prima facie*, to maintain the action. The controversy turned altogether upon the title set up by the defendants. That title was as follows: A letter of attorney, purporting to be executed by John Graham, bearing date the 23d of September, 1805, authorizing Nathaniel Massie to sell all his estate, etc., in all his lands in Ohio. This power was executed in the presence of two witnesses in Richmond, in Virginia, and was there acknowledged by Graham before a notary public.

Nathaniel Massie, by a deed dated the 7th day of June, 1810, and executed by him in Ohio, in his own right, as well as attorney to John Graham, conveyed to one Jacob Smith, under whom the defendants claimed the land in controversy. This deed was executed in presence of one witness only, and was duly acknowledged and recorded in the proper county in Ohio. The deed and letter of attorney so executed and acknowledged, were offered in evidence by the defendants, and were rejected by the court, upon the ground that they were not sufficient to convey lands according to the laws of Ohio. The defendants also offered in evidence a deed from Jacob Smith and wife, to the said Graham, dated the 7th of March, 1811, duly witnessed, acknowledged, and recorded, conveying a certain tract of land in Ohio, and offered further to prove, that the tract of land so conveyed was given in exchange for and in consideration of the lands conveyed by the deed first mentioned to Smith. This evidence, also, was rejected by the court. A bill of exceptions was taken to these proceedings by the defendants; and the jury found a verdict for the plaintiff, upon which a judgment

was entered for the plaintiff, and the present writ of error is brought by the defendants to revise that judgment.

The principal question before this court is, whether the deed so executed by Massie was sufficient to convey lands by the laws of Ohio. If not, it was properly rejected; if otherwise, the judgment should be reversed. Two objections have been taken to the execution of this deed; first, that the power of attorney was not duly acknowledged, as every deed is required to be in Ohio in order to convey lands; and if so, then the subsequent conveyance is void, for it is a general principle, that a power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands. On this objection, which is apparently well founded, it is unnecessary to dwell, as another objection is fatal; that is, the deed of Massie was executed in the presence of *one* witness only, whereas the law of Ohio requires all deeds for land to be executed in the presence of *two* witnesses. It is perfectly clear, that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situate. The act of Ohio regulating the conveyance of lands, passed on the 14th of February, 1805, provides, "that all deeds for the conveyance of lands, tenements, and hereditaments, situate, lying, and being within this State, shall be signed and sealed by the grantor in the presence of *two* witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within this State, shall be acknowledged by the party or parties, or proven by the subscribing witnesses, before a judge of the Court of Common Pleas, or a justice of the peace in any county in this State." Although there are no negative words in this clause, declaring all deeds for the conveyance of lands executed in any other manner to be void; yet this must be necessarily inferred from the clause in the absence of all words indicating a different legislative intent, and in point of fact such is understood to be the uniform construction of the act in the courts of Ohio. The deed, then, in this case, not being executed according to the laws of the State, the evidence was properly rejected by the Circuit Court.

The remaining point, as to the rejection of the evidence of the deed from Smith to Graham, and the proof to show that it was given in exchange for the land in controversy, has not been much relied on in this court. It is, indeed, too plain for argument, that if a deed imperfectly executed would not convey any estate or interest in the land, a parol exchange, or parol proof of an intention to convey the same in exchange, cannot be permitted to have any such effect.<sup>1</sup>

*Judgment affirmed, with costs.*

<sup>1</sup> *Acc.* Swank v. Hufnagle, 111 Ind. 453, 12 N. E. 303; Robinson v. Queen, 87 Tenn. 445; Shattuck v. Bates, 92 Wis. 633, 66 N. W. 706. But see Gates v. Gaither, 46 La. Ann. 286, 15 So. 50.

Conversely, a deed good according to the law of the situs constitutes a good conveyance, though it is not good according to the law of the place of making. *Post v.*

## CAMPBELL v. COON.

COURT OF APPEALS, NEW YORK. 1896.

[Reported 149 *New York*, 556.]

GRAY, J.<sup>1</sup> The learned judges of the General Term below have reversed the judgment recovered by these plaintiffs in their action for the foreclosure of a mechanic's lien and have ordered a dismissal of the complaint, upon the ground, as we find in the opinion, that "the right to a lien pursuant to the provisions of the Mechanics' Lien Law (Chap. 342, Laws of 1885), does not extend to contracts made and to be performed out of this State." I think that their conclusion was erroneous, and that a consideration of the case fails to disclose any ground for the reversal of the plaintiff's judgment. It appears from this record, following the findings of facts, that the defendant, Amalie Coon, contracted with the Vanderbeck Iron Work Company, a corporation created by the laws of the State of New Jersey, to furnish and erect the iron work in a certain building she was about constructing in the city of New York. That company then made a contract with the plaintiffs, who were also residents of the State of New Jersey, by which the latter agreed to make certain iron lintels and iron separators, at an agreed price and in accordance with the contract between the company and Mrs. Coon, and to deliver the same to the Iron Work Company "at and for the building" in question. The plaintiffs performed their agreement, and the materials called for in their agreement were delivered to the Iron Work Company "at the city of Hoboken in the State of New Jersey and at No. 368 Greenwich Street in the city of New York" (that being the place where the building was being erected), and all of them "were actually used in the construction of the building with the knowledge and consent" of Mrs. Coon. It is perfectly clear, therefore, in the first place, that under their contract the plaintiffs were required to deliver the materials, which they had agreed to furnish to the Iron Work Company, "at and for the building in the city of New York," and, in the second place, that those materials were actually used in its construction, and is there any satisfactory reason for denying to them the protection of the statute because the contract or agreement was one made without the State and between

First Nat. Bank, 138 Ill. 559, 28 N. E. 978; *Manton v. Seiberling*, 107 Ia. 534, 78 N. W. 194; *Succession of Larendon*, 39 La. Ann. 952, 3 So. 219; *Antonelli v. de la Palmira* (French Cassation, 2 Apr. 1884), 12 Clunet, 77.

So the validity of a conveyance is determined by the *lex rei sitæ*. *Moore v. Church*, 70 Ia. 208; *Goddard v. Sawyer*, 9 All. 78; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713.

So of the nature and extent of the interest conveyed, and the state of the title as a result of the conveyance. *McGoon v. Scales*, 9 Wall. 41; *Glover v. U. S.* 29 Ct. Cl. 236; *Danner v. Brewer*, 69 Ala. 191; *Bronson v. St. Croix Lumber Co.*, 44 Minn. 348, 46 N. W. 570. — ED.

<sup>1</sup> Part of the opinion is omitted. — ED.

non-residents of the State? I see no reason for so narrowly construing the provisions of the Mechanics' Lien Law. By its terms "any person" may have a lien, who shall have furnished any materials, which have been used in the erection of any building within any of the cities or counties of this State. Undoubtedly, the statute has no extra-territorial force, and was intended for the protection of those furnishing materials within this State; as it was held by this court in the case of *The Birmingham Iron Foundry v. The Glen Cove Starch Manufacturing Company*, 78 N. Y. 30, a case cited, and relied upon, in the opinion of the General Term. The facts, however, in that case were quite other than those before us. There, the defendant, a New York corporation, ordered the construction of a steam engine by the Woodruff Company, a Connecticut corporation, and the bed plate for the engine the Woodruff Company ordered of the plaintiff, also a Connecticut corporation. Under the contract between the defendant and the Woodruff Company, the engine was to be delivered to the defendant at Hartford, in the State of Connecticut, and the bed plate for the engine, under the sub-contract with the plaintiff, was also to be delivered at that city. The delivery of the engine, complete, was in fact made to the defendant at Hartford and the defendant brought it into this State and to its factory. Under these circumstances, it was very properly decided, inasmuch as when the engine was brought into this State it belonged to the defendant, that the plaintiff "furnished no materials in this State," and, therefore, could not claim the benefit of the statute. In this case the fact was, and such was the finding by the referee, that under the plaintiffs' agreement they were to deliver the materials at and for the building in New York City, which the defendant was to put up, and they performed their agreement in that respect and their materials were actually used in its construction.

In the opinion of the General Term, stress is laid upon the fact that no place of payment was specified, and it was reasoned that because the State, wherein the contract was made and the contracting parties resided, was in legal contemplation the place for payment, no right could be deemed to exist under the statute entitling the plaintiffs to a lien upon the building for their security. That proposition again assumes for the statute a purpose which, in our judgment, is not conveyed by its language. The operation of the Mechanics' Lien Law does not depend upon such incidents of the contract with the materialman as relate to its character, or to the place of payment; but solely upon the fact that the materialman has performed labor upon, or furnished materials to, any building within the State. The very case to which the General Term opinion refers, and which we have cited above, rested, in its decision, upon the fact that the plaintiff had really furnished no materials in this State. The language of this act is very broad and we perceive no limitation in its language, nor any good reason for reading one into it, by which the mechanic is required to be a resident of the State and to make his contract here. The materials must have been

furnished and used in the erection of a building within a city or county of this State and, when that is the case, the right of the materialman to a lien follows, if the provisions of the statute are otherwise complied with.<sup>1</sup>

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### SECTION III.

#### MOVABLES.

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### CAMELL *v.* SEWELL.

EXCHEQUER CHAMBER. 1860.

[*Reported 5 Hurlstone & Norman, 728.*]

TROVER for deals, with a count for money had and received. At the trial a verdict was taken for the plaintiffs, subject to a special case, which was substantially as follows. The plaintiffs were underwriters at Hull; the defendants merchants in London. The action was brought to recover part of a cargo of deals shipped on board the Prussian ship "Augusta Bertha" at Onega, in Russia, by the Onega Wood Company, for Messrs. Simpson & Whaplate, of Hull, and by them insured with the plaintiffs. The plaintiffs had paid Messrs. Simpson & Whaplate as for a total loss.

The "Augusta Bertha" having put into Harøe Roads, in Norway, in consequence of the shifting of her deck cargo, drove from her anchorage on the rocks at Smaage, about three miles from Molde. The cargo was discharged and the vessel abandoned, and the master sold the cargo by auction (against the protest of the representative of the consignees) to one Hans Clausen, who consigned them to the defendants. The cargo was sold by the defendants for an amount greater than the insurance money paid by the plaintiffs.

By the law of Norway, the sale by auction passed a good title to the purchaser, even if the master, as between himself and the owners, was acting wrongfully. The representative of the consignees instituted a suit in the Superior Diocesan Court of Trondjhem to set aside the sale; but the court confirmed the sale.

The Court of Exchequer ordered the verdict for the plaintiffs to be

<sup>1</sup> *Acc. Thurman v. Kyle*, 71 Ga. 628; *U. S. Inv. Co. v. Phelps & Bigelow* W. M. Co., 54 Kan. 144, 37 Pac. 982; *Pullis Bros. Iron Co. v. Natchitoches*, 51 La. Ann. 1377, 26 So. 402.

So generally the extent of a creditor's rights to enforce payment out of the debtor's land is determined by the *lex rei sitæ*. *Harrison v. Harrison*, L. R. 8 Ch. 342; *McGoon v. Scales*, 9 Wall. 23; *Brine v. Ins. Co.*, 96 U. S. 627; *Whipple v. Fowler*, 41 Neb. 675, 60 N. W. 15. — Ed.

set aside, and a verdict entered for the defendant; and the plaintiffs brought the case into the Exchequer Chamber on a writ of error.<sup>1</sup>

CROMPTON, J. In this case the majority of the court (COCKBURN, C. J., WIGHTMAN, WILLIAMS, CROMPTON, and KEATING, JJ.) are of opinion that the judgment of the Court of Exchequer should be affirmed. At the same time we are by no means prepared to agree with the Court of Exchequer in thinking the judgment of the Diocesan Court in Norway conclusive as a judgment *in rem*, nor are we satisfied that the defendants in the present action were estopped by the judgment of that court, or what was relied on as a judicial proceeding at the auction. It is not, however, necessary for us to express any decided opinion on these questions, as we think that the case should be determined on the real merits as to the passing of the property.

If we are to recognize the Norwegian law, and if according to that law the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that the subsequent bringing the property to England can alter the position of the parties. The difficulty which we have felt in the case principally arises from the mode in which the evidence is laid before us in the mass of papers and depositions contained in the appendix.

We do not see evidence in the case sufficient to enable us to treat the transaction as fraudulent on the part of Clausen, although there are circumstances which would have made it better for him not to have become the purchaser. Treating him, therefore, as an innocent purchaser, it appears to us that the questions are, did the property by the law of Norway vest in him as an innocent purchaser? and are we to recognize that law? The question of what is the foreign law is one of fact, and here again there is great difficulty in finding out from the mass of documents what is the exact state of the law. The conclusion which we draw from the evidence is, that by the law of Norway the captain, under circumstances such as existed in this case, could not, as between himself and his owners, or the owners of the cargo, justify the sale, but that he remained liable and responsible to them for a sale not justified under the circumstances; whilst, on the other hand, an innocent purchaser would have a good title to the property bought by him from the agent of the owners.

It does not appear to us that there is anything so barbarous or monstrous in this state of the law as that we can say that it should not be recognized by us. Our own law as to market overt is analogous; and though it is said that much mischief would be done by upholding sales of this nature, not justified by the necessities of the case, it may well

<sup>1</sup> This short statement of facts is substituted for that of the Reporters in 3 H. & N. 617. Arguments of counsel are omitted. In the course of the argument, COCKBURN, C. J., said: "If a person sends goods to a foreign country it may well be that he is bound by the law of that country; but here the goods were wrecked on the coast of Norway, and came there without the owner's assent. Could the arrival of the goods there enlarge the captain's authority?" — ED.

be that the mischief would be greater if the vendee were only to have a title in cases where the master was strictly justified in selling as between himself and the owners. If that were so, purchasers, who seldom can know the facts of the case, would not be inclined to give the value, and on proper and lawful sales by the master the property would be in great danger of being sacrificed.

There appears nothing barbarous in saying that the agent of the owners, who is the person to sell, if the circumstances justify the sale, and who must, in point of fact, be the party to exercise his judgment as to whether there should be a sale or not, should have the power of giving a good title to the innocent purchaser, and that the latter should not be bound to look to the title of the seller. It appears in the present case that the one purchaser bought the whole cargo; but suppose the farmers and persons in the neighborhood at such a sale buy several portions of the goods, it would seem extremely inconvenient if they were liable to actions at the suit of the owners, on the ground that there was no necessity for the sale. Could such a purchaser coming to England be sued in our courts for a conversion, and can it alter the case if he resell, and the property comes to this country?

Many cases were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Amongst others our law as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by a sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them, it would again be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the Lord Chief Baron in the course of the argument in the court below, where he says "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." And we do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that the goods which were wrecked here would on that account be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owner did not foresee that they would come to England.

Very little authority on the direct question before us has been brought to our notice. The only case which seems at variance with the principles we have enunciated is the case of the "*Eliza Cornish*" or "*Segredo*," before the judge of the Court of Admiralty. 1 Eccl. & Adm. 36. If this case be an authority for the proposition that a law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with the decision: and, with all the respect



due to so high an authority in mercantile transactions, we do not feel ourselves bound by it when sitting in a court of error. We must remark, also, that in the case of *Freeman v. The East India Company*, 5 B. & Ald. 617, the Court of Queen's Bench appear to have assented to the proposition that the Dutch law, as to market overt, might have had the effect of passing the property in such case if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law.

In the present case, which is not like the case of *Freeman v. The East India Company*, the case of an English subject purchasing in an English colony property which he was taken to know that the vendor had no authority to sell, we do not think that we can assume on the evidence that the purchase was made with the knowledge that the sellers had no authority, or under such circumstances as to bring the case within any exception to the foreign law, which seems to treat the master as having sufficient authority to sell, so as to protect the innocent purchaser where there is no representative of the real owner. It should be remarked, also, that Lord Stowell, in the passage, cited in the case of *Freeman v. The East India Company*, from his judgment in the case of the "*Gratitudine*," states that if the master acts unwisely in his decision as to selling, still the foreign purchaser will be safe under his acts. The doctrine of Lord Stowell agrees much more with the principles on which our judgment proceeds than with those reported to have been approved of in the case of the "*Eliza Cornish*," as, on the evidence before us, we cannot treat Clausen otherwise than as an innocent purchaser, and, as the law of Norway appears to us, on the evidence, to give a title to an innocent purchaser, we think that the property vested in him, and in the defendants as sub-purchasers from him, and that, having once so vested, it did not become divested by its being subsequently brought to this country, and, therefore, that the judgment of the Court of Exchequer should be affirmed.

COCKBURN, C. J. Concurring in the judgment delivered by my brother CROMPTON, it further appears to me that the case may also be put upon another and a shorter ground.

Although the goods in question were at one time the property of English owners, the property in them was transferred to others by a sale valid according to the law of Norway, a country in which the goods were at the time of such sale.

Even if it were admitted, for the purpose of argument, that by the law of the country to which the ship belonged the master would not have had the power to dispose of the ship or cargo in case of wreck, which the law of Norway gives in such a case, and that the law of Norway would be overridden by the law of the nation to which the ship belonged, then it is to be observed that, the ship having been a Prussian ship, and the carriers, the shipowners, Prussians, and the goods having been shipped in Russia, the power of the master must depend on the law either of the country to which the ship belonged, or

of the place where the contract to carry was entered into. The law of England, never having attached to the goods, as they never were on board an English vessel or reached British territory, cannot apply to the case. The law of nations cannot determine the question, for the international law is by no means uniform as to the powers of a master, as abundantly appeared from the various codes which were brought to our notice during the argument. But no evidence was adduced to show what was the law of Prussia or that of Russia in the matter in question.

The case therefore stands nakedly thus, — a good contract of sale to transfer the property in Norway, without anything to show that by the general law of nations, or by the law of any nation which can possibly apply to the present case, the sale valid in Norway can be invalidated elsewhere.

BYLES, J., dissented.

*Judgment affirmed.*<sup>1</sup>

## LANGWORTHY v. LITTLE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1853.

[*Reported 12 Cushing, 109.*]

THIS was an action of tort for a horse and buggy wagon, attached by the defendant, a deputy-sheriff, as the property of one Charles E. McCarty, September 11, 1849. The plaintiff, an inhabitant of Hillsdale, in the State of New York, claimed title under a prior mortgage from said McCarty, made and dated at said Hillsdale, September 1, 1849, at which time the property was at Hillsdale, and in the possession of said McCarty. The mortgage was duly filed in the town-clerk's office of Hillsdale, according to the laws of New York, which were produced and read at the trial in the Court of Common Pleas. Rev. Sts. of New York, vol. 2, p. 71. The plaintiff also proved a due demand on the defendant for the payment of the amount due him on said mortgage, pursuant to Rev. Sts. c. 90, § 79, and that payment was refused. The defendant offered to prove that said McCarty, the mortgagor, at

<sup>1</sup> The general rule that the passing of title to a chattel is determined by the law of the situs, not by that of the place of making the contract of transfer, nor by that of the domicile of the owner, is well established. *Mackey v. Pettyjohn*, 6 Kan. App. 57, 49 Pac. 636; *Ames v. McCamber*, 124 Mass. 85. (See, however, *N. W. Bank v. Poynter* [1895], A. C. 56; *Fouke v. Fleming*, 13 Md. 392.) Thus the requirements as to registration depend upon the law of the situs. *Coote v. Jecks*, L. R. 13 Eq. 597; *Gosline v. Dunbar*, 32 N. B. 325. If the title has passed by the law of the situs, the new title is recognized in any State into which the goods may be brought; and this although by the law of the latter State the title would not have passed. This rule obtains whether the title passed by consent of the parties, *Rabun v. Rabun*, 15 La. Ann. 471; *Sleeper v. Pa. R. R.*, 100 Pa. 259; or by operation of law, as, for instance, by the statute of limitations. *Shelby v. Guy*, 11 Wheat. 361; *Brown v. Brown*, 5 Ala. 508; *Waters v. Barton*, 1 Cold. 450. — ED.

the time of making the mortgage, resided in the town of Mount Washington, in this county, and after the mortgage was made, immediately returned with it to this State, and the same remained here in his possession, until it was attached by the defendant, on a writ in favor of citizens of Connecticut, who had no knowledge of the mortgage; nor was the same recorded in the town of Mount Washington. *Mellen, J.*, ruled that these facts constituted no defence to the action, and the verdict being for the plaintiff, the defendant excepted to such ruling. The other facts of the case are stated in the opinion.<sup>1</sup>

SHAW, C. J. This mortgage of personal property was made in New York, the property then being there, to a citizen of New York, there residing, recorded in the town-clerk's office in the town of Hillsdale, New York, and so made as to be valid, and bind the property in that State. Being removed into Massachusetts, it was here attached by the defendant, as the property of the mortgagor. The property in question was a horse and buggy wagon, and it appeared that the horse and wagon were sold by the plaintiff at Hillsdale, to McCarty, the mortgagor, and mortgaged back at the same time, to secure McCarty's note given at the same time, in part payment for said purchase. The plaintiff, by this conveyance, acquired a good qualified title to the property, by the laws of the State of New York, a property sufficient to enable him to maintain trover against a wrongdoer; and an officer attaching the property as the property of the mortgagor, especially without paying, and in fact refusing to pay the debt of the mortgagee, when notified to him and demanded of him, is as to him a wrongdoer. A party who obtains a good title to property, absolute or qualified, by the laws of a sister State, is entitled to maintain and enforce those rights in this State. It is a case where the *lex loci contractus* must govern.

We think there is no ground for the argument, that by the St. 1843, c. 72, this mortgage should have been recorded by the clerk of the town where the mortgagor resides, and also of the town where he principally transacts his business, or follows his calling, and that said statute obviously applies only to mortgages made in Massachusetts.

*Exceptions overruled.*<sup>2</sup>

<sup>1</sup> Arguments of counsel are omitted. — Ed.

<sup>2</sup> *Acc.* U. S. Bank v. Lee, 13 Pet. 107; *Alferitz v. Ingalls*, 83 Fed. 964; *Beall v. Williamson*, 14 Ala. 55; *Hall v. Pillow*, 31 Ark. 32; *Ballard v. Winter*, 39 Conn. 179; *Peterson v. Kaigler*, 78 Ga. 464, 3 S. E. 655; *Mumford v. Cauty*, 50 Ill. 370; *Smith v. McLean*, 24 Ia. 322; *Handley v. Harris*, 48 Kan. 606, 29 Pac. 1145; *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 364; *Barker v. Stacy*, 25 Miss. 471; *Smith v. Hutchings*, 30 Mo. 380; *Offutt v. Flagg*, 10 N. H. 46; *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. 721; *Wilson v. Rustad*, 7 N. D. 330, 75 N. W. 260; *Kanaga v. Taylor*, 7 Ohio S. 134; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353; *Crenshaw v. Anthony*, Mart. & Y. 102; *Craig v. Williams*, 90 Va. 500, 185 E. 899; *McGregor v. Kerr*, 29 N. S. 45.

*Contra*, *Wilson v. Carson*, 12 Md. 54; *Corbett v. Littlefield*, 84 Mich. 30 (see *Vining v. Millar*, 109 Mich. 205, 67 N. W. 126); *Armitage v. Spahn*, 4 Pa. Dist. Ct. 270. And see *Jones v. Taylor*, 30 Vt. 42.

In *Greenville Nat. Bank v. E. S. B. Co.*, *supra*, BURWELL, J., said: "If these mortgages were valid mortgages where executed and where the property was located

## GREEN v. VAN BUSKIRK.

SUPREME COURT OF THE UNITED STATES. 1866, 1886.

*[Reported 5 Wallace, 307; 7 Wallace, 139.]*

MOTION to dismiss a writ of error to the Supreme Court of the State of New York.

The Constitution of the United States declares (Section 1, Article 4) that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and that Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Under the power here conferred, Congress, by act of 1790, May 26, 1 Stat. at Large, 122, provides that records, authenticated in a way which it prescribes, shall "have such faith and credit given to them in every other court of the United States as they have by law or usage in the court from which they are taken."

With this provision of the Constitution and this law in force, Bates being the owner of certain iron safes at Chicago, in the State of Illinois, on the 3d day of November, 1857, executed and delivered, in the State of New York, to Van Buskirk and others, a chattel mortgage of them. On the 5th day of the same month Green caused to be levied on the same safes a writ of attachment, sued by him out of the proper court in Illinois, against the property of Bates. The attachment suit proceeded to judgment, and the safes were sold in satisfaction of Green's debt. Van Buskirk, Green, and Bates were all citizens of New York. Green's attachment was levied on the safes as the property of Bates, before the possession was delivered to Van Buskirk, and before the mortgage from Bates to him was recorded, and before notice of its existence.

Van Buskirk afterwards sued Green, in the New York courts, for the value of the safes thus sold under his attachment, and Green pleaded the proceeding in the court of Illinois in bar of the action. In this suit thus brought by him in the New York courts, Van Buskirk obtained judgment, and the judgment was affirmed in the highest court of the State of New York. From this affirmance Green took a writ of error to this court, assuming the case to fall within the twenty-fifth section of the Judiciary Act, which gives such writ in any case wherein is drawn in question a clause of the Constitution of the United States, and the

at the time, the rights of the mortgagee are vested rights which cannot be taken away from it. . . . We have no doubt but that the legislature has the power to enact a law providing for the filing of chattel mortgages executed in another State within a reasonable time after the mortgaged property is brought into this territory, and to provide that such mortgage shall be absolutely void as against creditors, and purchasers, and incumbrancers in good faith for value, if not filed within the time fixed; but this has not been done."

decision is against the title, right, or privilege specially set up. His assumption was that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that State, were denied to them by the decision of the courts of New York, and that in such denial, those courts decided against a right claimed by him under the above-mentioned Section 1, Article 4, of the Constitution, and the act of Congress of May 26, 1790, on the subject of it.<sup>1</sup>

MILLER, J. The section of the Constitution discussed in this case, declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State: and that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The act of 1790 was intended to be an exercise of the power conferred upon Congress by this section. In the leading case of *Mills v. Duryee*, 7 Cranch, 481, this court held that the act in question did declare the effect of such judicial records, and that it should be the same in other States as that in which the proceedings were had. In the case of *Christmas v. Russell*, 5 Wall. 290, decided at the present term of the court, we have reaffirmed this doctrine, and have further declared that no State can impair the effect thus to be given to judicial proceedings in her sister State, by a statute of limitation intended to operate on demands which may have passed into judgment by such proceedings, as though no such judgment had been rendered.

The record before us contains the pleadings in the case, the facts found by the court, and the conclusions of law arising thereon. And notwithstanding the inverted manner in which the court has stated its legal conclusions, it seems clear that it did pass upon the effect of the judicial proceedings in Illinois upon the title of the property in contest. The case is not varied by declaring that the mortgage made and delivered in New York overreached the subsequent attachment in Illinois. According to the view taken by that court, Van Buskirk, the plaintiff, had title to the property under the laws of New York by virtue of his mortgage, and the question to be decided was whether the proceedings in Illinois were paramount in their effect upon the title to the New York mortgage.

It is said that Van Buskirk being no party to the proceedings in Illinois was not bound by them, but was at liberty to assert his claim to the property in any forum that might be open to him; and, strictly speaking, this is true. He was not bound by way of estoppel, as he would have been if he had appeared and submitted his claim, and contested the proceedings in attachment. He has a right to set up any title to the property which is superior to that conferred by the attachment proceedings, and he has the further right to show that the property was not liable to the attachment, — a right from which he would

<sup>1</sup> Arguments of counsel are omitted. — ED

have been barred if he had been a party to that suit. And this question of the liability of the property in controversy to that attachment is the question which was raised by the suit in New York, and which was there decided. That court said that this question must be decided by the laws of the State of New York, because that was the domicile of the owner at the time the conflicting claims to the property originated.

We are of opinion that the question is to be decided by the effect given by the laws of Illinois, where the property was situated, to the proceedings in the courts of that State, under which it was sold.

There is no little conflict of authority on the general question as to how far the transfer of personal property by assignment or sale, made in the country of the domicile of the owner, will be held to be valid in the courts of the country where the property is situated, when these are in different sovereignties. The learned author of the *Commentaries on the Conflict of Laws* has discussed the subject with his usual exhaustive research. And it may be conceded that as a question of comity, the weight of his authority is in favor of the proposition that such transfers will generally be respected by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law. The courts of Vermont and Louisiana, which have given this question the fullest consideration, have, however, either decided adversely to this doctrine or essentially modified it. *Taylor v. Boardman*, 25 Vt. 589; *Ward v. Morrison*, id. 593; *Emmerson v. Partridge*, 27 Vt. 8; *Oliver v. Townes*, 14 Mart. La. 93; *Norris v. Mumford*, 4 Mart. La. 20. Such also seems to have been the view of the Supreme Court of Massachusetts. *Lanfear v. Sumner*, 17 Mass. 110.

But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where property is situated, or the established policy of its laws prescribe to its courts a different rule. The learned commentator, already referred to, in speaking of the law in Louisiana which gives paramount title to an attaching creditor over a transfer made in another State, which is the domicile of the owner of the property, says: "No one can seriously doubt that it is competent for any State to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or a selfish policy." *Story on the Conflict of Laws*, § 390. Again, he says: "Every nation, having a right to dispose of all the property actually situated within it, has (as has been often said) a right to protect itself and its citizens against the inequalities of foreign laws, which are injurious to their interests."

Chancellor Kent, in commenting on a kindred subject, namely, the law of contracts, remarks, 2 Com. 599: "But, on this subject of conflicting laws, it may be generally observed that there is a stubborn

principle of jurisprudence that will often intervene and act with controlling efficacy. This principle is, that where the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land."

In the case of *Milne v. Moreton*, 6 Bin. 361, the Supreme Court of Pennsylvania says, that "every country has a right of regulating the transfer of all personal property within its territory; but when no positive regulation exists, the owner transfers it at his pleasure."

The Louisiana court, in a leading case on this subject, gives, in the following language, a clear statement of the foundation of this principle: "The municipal laws of a country have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted on her own citizens, otherwise justice would be sacrificed to comity. . . . If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it."

Apart from the question of authority, let us look at some of the consequences of the doctrine held by the court of New York.

If the judgment rendered against the plaintiff in error is well founded, then the sheriff who served the writ of attachment, the one who sold the property on execution, any person holding it in custody pending the attachment proceeding, the purchaser at the sale, and all who have since exercised control over it, are equally liable.

If the judgment in the State of Illinois, while it protects all such persons against a suit in that State, is no protection anywhere else, it follows that in every case where personal property has been seized under attachment, or execution against a non-resident debtor, the officer whose duty it was to seize it, and any other person having any of the relations above described to the proceeding, may be sued in any other State, and subjected to heavy damages by reason of secret transfers of which they could know nothing, and which were of no force in the jurisdiction where the proceedings were had, and where the property was located.

Another consequence is that the debtor of a non-resident may be sued by garnishee process, or by foreign attachment as it is sometimes called, and be compelled to pay the debt to some one having a demand against his creditors; but if he can be caught in some other State, he may be made to pay the debt again to some person who had an assignment of it, of which he was ignorant when he was attached.

The article of the Constitution, and the act of Congress relied on by the plaintiff in error, if not expressly designed for such cases as these, find in them occasions for their most beneficent operation.

We do not here decide that the proceedings in the State of Illinois have there the effect which plaintiff claims for them, because that

must remain to be decided after argument on the merits of the case. But we hold that the effect which these proceedings have there, by the law and usage of that State, was a question necessarily decided by the New York courts, and that it was decided against the claim set up by plaintiff in error under the constitutional provision and statute referred to, and that the case is therefore properly here for review.

*Motion to dismiss overruled.*

NELSON and SWAYNE, JJ., dissenting.

DAVIS, J. [on the merits].<sup>1</sup> It should be borne in mind in the discussion of this case, that the record in the attachment suit was not used as the foundation of an action, but for purposes of defence. Of course Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached. But as by the law of Illinois Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows that when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment, and sale is to protect Green if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another State for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a State the power to regulate the transfer of personal property within its limits and to subject such property to legal proceedings.

Attachment laws, to use the words of Chancellor Kent, "are legal modes of acquiring title to property by operation of law." They exist in every State for the furtherance of justice, with more or less of liberality to creditors. And if the title acquired under the attachment laws of a State, and which is valid there, is not to be held valid in every other State, it were better that those laws were abolished, for they would prove to be but a snare and a delusion to the creditor.

The Vice-Chancellor of New York, in *Cochran v. Fitch*, 1 Sandf. Ch. 146, when discussing the effect of certain attachment proceedings in the State of Connecticut, says: "As there was no fraud shown, and the court in Connecticut had undoubted jurisdiction *in rem* against the complainant, it follows that I am bound in this State to give to the proceedings of that court the same faith and credit they would have in Connecticut." As some of the judges of New York had spoken of these proceedings in another State, without service of process or appearance, as being nullities in that State and void, the same vice-chancellor says: "But these expressions are all to be referred to the cases then under

<sup>1</sup> Part of the opinion is omitted. — ED.



consideration, and it will be found that all those were suits brought upon the foreign judgment as a debt, to enforce it against the person of the debtor, in which it was attempted to set up the judgment as one binding on the person."

The distinction between the effect of proceedings by foreign attachments, when offered in evidence as the ground of recovery against the person of the debtor, and their effect when used in defence to justify the conduct of the attaching creditor, is manifest and supported by authority. *Cochran v. Fitch*, 1 Sandf. Ch. 146; *Kane v. Cook*, 8 Cal. 449. Chief Justice Parker, in *Hall v. Williams*, 6 Pick. 232, speaking of the force and effect of judgments recovered in other States, says: "Such a judgment is to conclude as to everything over which the court which rendered it had jurisdiction. If the property of the citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive."

It would seem to be unnecessary to continue this investigation further, but our great respect for the learned court that pronounced the judgment in this case, induces us to notice the ground on which they rested their decision. It is, that the law of the State of New York is to govern this transaction, and not the law of the State of Illinois where the property was situated; and as, by the law of New York, Bates had no property in the safes at the date of the levy of the writ of attachment, therefore none could be acquired by the attachment. The theory of the case is, that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge Story says, "yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined." It has yielded in New York on the power of the State to tax the personal property of one of her citizens, situated in a sister State (*The People ex. rel. Hoyt v. The Commissioner of Taxes*, 23 N. Y. 225), and always yields to "laws for attaching the estate of non-residents, because such laws necessarily assume that property has a situs entirely distinct from the owner's domicile." If New York cannot compel the personal property of Bates (one of her citizens) in Chicago to contribute to the expenses of her government, and if Bates had the legal right to own such property there, and was protected in its ownership by the laws of the State, and as the power to protect implies the right to regulate, it would seem to follow that the dominion of Illinois over the property was complete, and her right perfect to regulate its transfer and subject it to process and execution in her own way and by her own laws.

We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule

of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives.

*Judgment for the plaintiff in error.*<sup>1</sup>

## HERVEY v. RHODE ISLAND LOCOMOTIVE WORKS.

SUPREME COURT OF THE UNITED STATES. 1876.

[Reported 93 *United States*, 664.]

THE Rhode Island Locomotive Works sold to Conant & Co. a locomotive, title to remain in the seller till full payment of the purchase price. The locomotive was delivered to Conant & Co. in Rhode Island, and was by them taken to Illinois. The agreement of sale was not recorded in Illinois according to the law of that State. The locomotive was seized by a sheriff in Illinois as the property of Conant & Co., and was sold by him to Hervey. The Locomotive Works brought an action of replevin in the Circuit Court of the United States for Southern Illinois, to recover possession of the locomotive from Hervey. The court gave judgment for the plaintiff, and the defendant brought this writ of error.<sup>2</sup>

DAVIS, J. It was decided by this court, in *Green v. Van Buskirk*, 5 Wall. 307, 7 Wall. 139, that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in that jurisdiction, respected in the courts of the State where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter State conflict with those of the former.

The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of

<sup>1</sup> Acc. *Ames Iron Works v. Warren*, 76 Ind. 512; *Keller v. Paine*, 107 N. Y. 83, 13 N. E. 635. — ED.

<sup>2</sup> This statement is condensed from that of the Reporter. Arguments of counsel are omitted. — ED.

title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without notice to the world the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another, to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the Chattel-Mortgage Act. R. S. Ill. 1874, 711, 712. It requires that the instrument of conveyance, if it have the effect to preserve a mortgage or lien on the property, must be recorded, whether the party to it be a resident or non-resident of the State. If this be not done, the instrument, so far as third persons are concerned, has no validity.

Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser, as the owner until the payment of the purchase-money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. *McCormick v. Hadden*, 37 Ill. 370; *Ketchum v. Watson*, 24 Ill. 591. Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts always look to its purpose, rather than to the name given to it by the parties. If that purpose be to give the vendor a lien on the property until payment in full of the purchase-money, it is liable to be defeated by creditors of the purchaser who is in possession of it. This was held in *Murch v. Wright*, 46 Ill. 488. In that case the purchaser took from the seller a piano at the price of \$700. He paid \$50 down, which was called rent for the first month, and agreed to pay, as rent, \$50 each month, until the whole amount should be paid, when he was to own the piano. The court held, "that it was a mere subterfuge to call the transaction a lease," and that it was a conditional sale, with the right of rescission on the part of the vendor, in case the purchaser should fail in payment of his instalments, — a contract legal and valid as between the parties, but subjecting the vendor to lose his lien in case the property, while in possession of the purchaser, should be levied upon by his creditors. That case and the one at bar are alike in all essential particulars.

The engine *Smyser*, the only subject of controversy in this suit, was sold on condition that each and all of the instalments should be regularly paid, with a right of rescission on the part of the vendor in case of default in any of the specified payments.

It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction, as much so as was the rent of the piano in *Murch v. Wright*, *supra*. There the price of the piano was to be paid in thirteen months, and here, that of the engine, \$12,093.96, in one year. It was evidently not the intention that this large sum should be

paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last instalment? In both cases, the stipulated price of the property was to be paid in short instalments, and no words employed by the parties can have the effect of changing the true nature of the contracts. In the case at bar the agreement contemplated that the engine should be removed to the State of Illinois, and used by Conant & Co. in the prosecution of their business as constructors of a railroad. It was accordingly taken there and put to the use for which it was purchased; but while in the possession of Conant & Co., who exercised complete ownership over it, it was seized and sold, in the local courts of Illinois, as their property. These proceedings were valid in the jurisdiction where they took place, and must be respected by the Federal tribunals.

The Rhode Island Locomotive Works took the risk of losing its lien in case the property, while in the possession of Conant & Co., should be levied on by their creditors, and it cannot complain, as the laws of Illinois pointed out a way to preserve and perfect its lien.

By stipulation the judgment of the court below is affirmed as to the locomotive Olney, No. 1.

As to the locomotive and tender called Alfred N. Smyser, No 3,

*Judgment reversed.*<sup>1</sup>

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### EMERY v. CLOUGH.

SUPREME COURT OF NEW HAMPSHIRE. 1885.

[Reported 63 *New Hampshire*, 552.]

BILL IN EQUITY, under General Laws, c. 209, § 2, for discovery, and the restoration of a municipal bond for \$1,000, alleged to belong to the estate of William Emery, the plaintiff's intestate, unlawfully withheld by the defendant.<sup>2</sup> . . .

The legal domicile of said William Emery during his whole life was at London, in this State. May 21, 1882, being very sick while temporarily at Montpelier, Vt., he delivered to the defendant as a *donatio causa mortis*, the bond in question.

SMITH, J. It is contended on the part of the defendant that the transaction in Vermont, whereby the defendant became possessed of the bond, was a *donatio causa mortis*, valid as an executed contract under the laws of Vermont, and therefore valid here. The plaintiff contends that the transaction was in the nature of a testamentary disposition of property, and if valid in Vermont as a *donatio causa*

<sup>1</sup> *Acc.* Marsh v. Ellsworth, 37 Ala. 85; Delop v. Windsor, 26 La. Ann 185; and see Donald v. Hewitt, 33 Ala. 534.

<sup>2</sup> Only so much of the case as involves the validity of the gift of this bond is here given. — Ed.

*mortis*, it is not valid in this State because it was not proved by the testimony of two indifferent witnesses upon petition by the donee to the Probate Court to establish the gift filed within sixty days after the decease of the donor. G. L., c. 193, § 17. The domicile of the parties at the time of the delivery of the bond to the defendant, and ever afterwards, to the death of the donor, being in this State, it is claimed that the neglect of the defendant to establish the gift in the Probate Court is fatal to her right to retain the bond. Every requisite to constitute a valid gift *causa mortis* under the laws of Vermont, where the parties were temporarily residing at the time of the delivery of the bond, was complied with. *Holley v. Adams*, 16 Vt. 206; *Caldwell v. Renfrew*, 33 Vt. 213; *French v. Raymond*, 39 Vt. 623. Every requisite, also, to constitute such a gift under the laws of New Hampshire was complied with except the *post mortem* proceedings required by our statute. The question therefore is, whether the *lex loci* or the *lex domicilii* governs; and the answer to this question depends upon the legal character and effect of such gifts.

A gift *causa mortis* is often spoken of in the books as a testamentary disposition of property, or as being in the nature of a legacy. *Jones v. Brown*, 34 N. H. 439; 1 Wms. Ex'rs, 686, *n.* 1. And such was the doctrine of the civil law. 2 Kent Com. 444, and authorities cited in note *b.* Such gifts are always made upon condition that they shall be revocable during the lifetime of the donor, and that they shall revert in case he shall survive the donee, or shall be delivered from the peril of death in which they were made. The condition need not be expressed, as it is always implied when the gift is made in the extremity of sickness, or in contemplation of death. It is sometimes, perhaps generally, said in the English cases that a gift *causa mortis* does not vest before the donor's death; but in *Nicholas v. Adams*, 2 Whart. (Pa.) 17, *Gibson, C. J.*, considered this to be inaccurate, holding that this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, deliverance from peril, or from some other act inconsistent with the gift, and indicating the donor's purpose to resume the possession of the gift. 1 Wms. Ex'rs, 686, *n.* 1; *Marshall v. Berry*, 13 Allen, 43, 46.

A gift *causa mortis* resembles a testamentary disposition of property in this, — that it is made in contemplation of death, and is revocable during the life of the donor. It is not, however, a testament, but in its essential characteristics is, what its name indicates, a gift. Actual delivery by the donor in his lifetime is necessary to its validity, or if the nature of the property is such that it is not susceptible of corporeal delivery, the means of obtaining possession of it must be delivered. The donee's possession must continue during the life of the donor, for recovery of possession by the latter is a revocation of the gift. But in case of a legacy, the possession remains with the testator until his decease. The title to a gift *causa mortis* passes by the delivery,

defeasible only in the lifetime of the donor, and his death perfects the title in the donee by terminating the donor's right or power of defeasance. The property passes from the donor to the donee directly, and not through the executor or administrator, and after his death it is liable to be divested only in favor of the donor's creditors. In this respect it stands the same as a gift *inter vivos*. It is defeasible in favor of creditors, not because it is testamentary, but because, as against creditors, one cannot give away his property. A gift *causa mortis* is not subject to probate, nor to contribution with legacies in case the assets are insufficient, nor to any of the incidents of administration. It is not revocable by will, for, as a will does not operate until the decease of the testator, and the donor, at his decease, is divested of his property in the subject of the gift, no right or title in it passes to his representatives. The donee takes the gift, not from the administrator, but against him, and no act or assent on the part of the administrator is necessary to perfect the title of the donee. *Cutting v. Gilman*, 41 N. H. 147, 151; *Marshall v. Berry*, *supra*; *Doty v. Willson*, 47 N. Y. 580, 585; *Dole v. Lincoln*, 31 Me. 422; *Chase v. Redding*, 13 Gray, 418; *Basket v. Hassell*, 107 U. S. 602; 1 Wms. Ex'rs, 686, n. 1. A valid gift *inter vivos* may be made on similar terms. *Worth v. Case*, 42 N. Y. 362; *Dean v. Carruth*, 108 Mass. 242; *Warren v. Durfee*, 126 Mass. 338.

A gift *causa mortis* in some respects may be said to resemble a contract, the mutual consent and concurrent will of both parties being necessary to the validity of the transfer. 2 Kent Com. 437, 438; 1 Pars. Cont. 234. Contracts are commonly understood to mean engagements resulting from negotiation. 2 Kent. Com. 437. And in *Peirce v. Burroughs*, 58 N. H. 302, it was held that the assent of both parties is as necessary to a gift as to a contract.

Prior to the passage of c. 106, Laws of 1883, the law required a will to be executed according to the law of the testator's domicile at the time of his death. *Saunders v. Williams*, 5 N. H. 213; *Heydock's Appeal*, 7 N. H. 496. The distribution of the estate of a deceased person among the heirs or legatees is to be made according to the law of the domicile of the testator or intestate at the time of his death. *Leach v. Pillsbury*, 15 N. H. 137. But the plaintiff's intestate did not die possessed of the bond in suit. It did not vest in his administrator, and is not assets of his estate. The defeasible title which vested in the defendant at the time of the delivery was not defeated by the donor in his lifetime, and his right and power to defeat it ceased with his death. A gift *causa mortis* is not a testament. If it is a contract, in this case it was executed in Vermont in the life of the plaintiff's intestate. If it is not a contract, as that term is commonly understood, it is a gift which received the assent of both parties, and nothing remained to perfect the conditional title of the defendant before the decease of the donor. The transfer of the bond being, therefore, either an executed contract or a perfected gift in Vermont, and valid under the laws of

Vermont, is valid here; and no question arises whether our statute (G. L., c. 193, § 17) affects the contract or the remedy. That section applies to gifts made in this State. *Case discharged.*

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MARVIN SAFE COMPANY v. NORTON.

SUPREME COURT OF NEW JERSEY. 1886.

[*Reported 48 New Jersey Law, 410.*]

ON May 1, 1884, one Samuel N. Schwartz, of Hightstown, Mercer county, New Jersey, went to Philadelphia, Pennsylvania, and there, in the office of the prosecutors, executed the following instrument: —

“ May 1st, 1884.

“ *Marvin Safe Company:*

“ Please send, as per mark given below, one second-hand safe, for which the undersigned agrees to pay the sum of eighty-four dollars (\$84), seven dollars cash, and balance seven dollars per month. Terms cash, delivered on board at Philadelphia or New York, unless otherwise stated in writing. It is agreed that Marvin Safe Company shall not relinquish its title to said safe, but shall remain the sole owners thereof until above sum is fully paid in money. In event of failure to pay any of said instalments or notes, when same shall become due, then all of said instalments or notes remaining unpaid shall immediately become due. The Marvin Safe Company may, at their option, remove said safe without legal process. It is expressly understood that there are no conditions whatever not stated in this memorandum, and the undersigned agrees to accept and pay for safe in accordance therewith. SAMUEL N. SCHWARTZ.

“ Mark — Samuel N. Schwartz, Hightstown, New Jersey.

“ Route — New Jersey.

“ Not accountable for damages after shipment.”

Schwartz paid the first instalment of \$7 May 1, 1884, and the safe was shipped to him the same day. He afterwards paid two instalments, of \$7 each, by remittance to Philadelphia by check. Nothing more was paid.

On July 30, 1884, Schwartz sold and delivered the safe to Norton for \$55. Norton paid him the purchase-money. He bought and paid for the safe without notice of Schwartz's agreement with the prosecutors. Norton took possession of the safe and removed it to his office. Schwartz is insolvent and has absconded.

The prosecutor brought trover against Norton, and in the court below the defendant recovered judgment, on the ground that the defendant, having bought and paid for the safe *bona fide*, the title to the safe, by the law of Pennsylvania, was transferred to him.

DEPUE, J. The contract expressed in the written order of May 1, 1884, signed by Schwartz, is for the sale of the property to him conditionally, the vendor reserving the title, notwithstanding delivery, until the contract price should be paid. The courts of Pennsylvania make a distinction between the bailment of a chattel, with power in the bailee to become the owner on payment of the price agreed upon, and the sale of a chattel with a stipulation that the title shall not pass to the purchaser until the contract price shall be paid. On this distinction the courts of that State hold that a bailment of chattels, with an option in the bailee to become the owner on payment of the price agreed upon, is valid, and that the right of the bailor to resume possession on non-payment of the contract price is secure against creditors of the bailee and *bona fide* purchasers from him; but that upon the delivery of personal property to a purchaser under a contract of sale, the reservation of title in the vendor until the contract price is paid is void as against creditors of the purchaser or a *bona fide* purchaser from him. *Clow v. Woods*, 5 S. & R. 275; *Enlow v. Klein*, 79 Penn. St. 488; *Haak v. Linderman*, 64 Penn. St. 499; *Stadfeld v. Huntsman*, 92 Penn. St. 53; *Brunswick v. Hoover*, 95 Penn. St. 508; 1 Benj. on Sales (Corbin's ed.), § 446; 30 Am. Law Reg. 224, note to *Lewis v. McCabe*.

In the most recent case in the Supreme Court of Pennsylvania Mr. Justice Sterrett said: "A present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that in default of such payment the vendor may recover possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon. As between the parties to such contracts, both are valid and binding; but as to creditors, the latter is good while the former is invalid." *Forest v. Nelson*, 19 Rep. 38; 108 Penn. St. 481.

The cases cited show that the Pennsylvania courts hold the same doctrine with respect to *bona fide* purchasers as to creditors.

In this State, and in nearly all of our sister States. conditional sales — that is, sales of personal property on credit, with delivery of possession to the purchaser and a stipulation that the title shall remain in the vendor until the contract price is paid — have been held valid, not only against the immediate purchaser, but also against his creditors and *bona fide* purchasers from him, unless the vendor has conferred upon his vendee *indicia* of title beyond mere possession, or has forfeited his right in the property by conduct which the law regards as fraudulent. The cases are cited in *Cole v. Berry*, 13 Vroom, 308; *Midland R. R. Co. v. Hitchcock*, 10 Stew. Eq. 549, 559; 1 Benj. on Sales (Corbin's ed.), §§ 437-460; 1 Smith's Lead. Cas. (8th ed.) 33-90; 30 Am. Law Reg. 224, note to *Lewis v. McCabe*; 15 Am. Law Rev. 380, tit. "Conversion by Purchase." The doctrine of the courts of Pennsylvania is



founded upon the doctrine of *Twyne's Case*, 3 Rep. 80, and *Edwards v. Harbin*, 2 T. R. 587, that the possession of chattels under a contract of sale without title is an indelible badge of fraud — a doctrine repudiated quite generally by the courts of this country, and especially in this State. *Runyon v. Groshon*, 1 Beas. 86; *Broadway Bank v. McElrath*, 2 Beas. 24; *Miller v. ds. Pancoast*, 5 Dutch. 250. The doctrine of the Pennsylvania courts is disapproved by the American editors of *Smith's Leading Cases* in the note to *Twyne's Case*, 1 Sm. Lead Cas. (8th ed.) 33, 34, and by Mr. Landreth in his note to *Lewis v. McCabe*, 30 Am. Law Reg. 224; but nevertheless the Supreme Court of that State, in the latest case on the subject — *Forest v. Nelson*, decided February 16, 1885 — has adhered to the doctrine. It must therefore be regarded as the law of Pennsylvania that upon a sale of personal property with delivery of possession to the purchaser, an agreement that title should not pass until the contract price should be paid is valid as between the original parties, but that creditors of the purchaser, or a purchaser from him *bona fide*, by a levy under execution or a *bona fide* purchase, will acquire a better title than the original purchaser had — a title superior to that reserved by his vendor. So far as the law of Pennsylvania is applicable to the transaction it must determine the rights of these parties.

The contract of sale between the Marvin Safe Company and Schwartz was made at the company's office in Philadelphia. The contract contemplated performance by the delivery of the safe in Philadelphia to the carrier for transportation to Hightstown. When the terms of sale are agreed upon, and the vendor has done everything that he has to do with the goods, the contract of sale becomes absolute. *Leonard v. Davis*, 1 Black, 476; 1 Benj. on Sales, § 308. Delivery of the safe to the carrier in pursuance of the contract was delivery to Schwartz, and was the execution of the contract of sale. His title, such as it was, under the terms of the contract was thereupon complete.

The validity, construction, and legal effect of a contract may depend either upon the law of the place where it is made or of the place where it is to be performed, or, if it relate to movable property, upon the law of the situs of the property, according to circumstances; but when the place where the contract is made is also the place of performance and of the situs of the property, the law of that place enters into and becomes part of the contract, and determines the rights of the parties to it. *Fredericks v. Frazier*, 4 Zab. 162; *Dacosta v. Davis*, 4 Zab. 319; *Bulkley v. Honold*, 19 How. 390; *Scudder v. Union National Bank*, 91 U. S. 406; *Pritchard v. Norton*, 106 U. S. 124; *Morgan v. N. O., M. & T. R. R. Co.*, 2 Woods, 244; *Simpson v. Fogo*, 9 Jur. (n. s.) 403; *Whart. Confl. of Law*, §§ 341, 345, 401, 403, 418; *Parr v. Brady*, 8 Vroom, 201. The contract between Schwartz and the company having been made, and also executed in Pennsylvania by the delivery of the safe to him, as between him and the company Schwartz's title will be determined by the law of Pennsylvania. By the law of that State

the condition expressed in the contract of sale that the safe company should not relinquish title until the contract price was paid, and that on the failure to pay any of the instalments of the price the company might resume possession of the property, was valid as between Schwartz and the company. By his contract Schwartz obtained possession of the safe and a right to acquire title on payment of the contract price: but until that condition was performed the title was in the company. In this situation of affairs the safe was brought into this State, and the property became subject to our laws.

The contract of Norton, the defendant, with Schwartz for the purchase of the safe was made at Hightstown in this State. The property was then in this State, and the contract of purchase was executed by delivery of possession in this State. The contract of purchase, the domicile of the parties to it, and the situs of the subject-matter of purchase were all within this State. In every respect the transaction between Norton and Schwartz was a New Jersey transaction. Under these circumstances, by principles of law which are indisputable, the construction and legal effect of the contract of purchase, and the rights of the purchaser under it, are determined by the law of this State. By the law of this State Norton, by his purchase, acquired only the title of his vendor, — only such title as the vendor had when the property was brought into this State and became subject to our laws.

It is insisted that inasmuch as Norton's purchase, if made in Pennsylvania, would have given him a title superior to that of the safe company, that therefore his purchase here should have that effect, on the theory that the law of Pennsylvania, which subjected the title of the safe company to the rights of a *bona fide* purchaser from Schwartz, was part of the contract between the company and Schwartz. There is no provision in the contract between the safe company and Schwartz that he should have power, under any circumstances, to sell and make title to a purchaser. Schwartz's disposition of the property was not in conformity with his contract, but in violation of it. His contract, as construed by the laws of Pennsylvania, gave him no title which he could lawfully convey. To maintain title against the safe company Norton must build up in himself a better title than Schwartz had. He can accomplish that result only by virtue of the law of the jurisdiction in which he acquired his rights.

The doctrine of the Pennsylvania courts that a reservation of title in the vendor upon a conditional sale is void as against creditors and *bona fide* purchasers, is not a rule affixing a certain construction and legal effect to a contract made in that State. The legal effect of such a contract is conceded to be to leave property in the vendor. The law acts upon the fact of possession by the purchaser under such an arrangement, and makes it an indelible badge of fraud and a forfeiture of the vendor's reserved title as in favor of creditors and *bona fide* purchasers. The doctrine is founded upon considerations of public policy adopted in that State, and applies to the fact of possession and acts of owner-

ship under such a contract, without regard to the place where the contract was made, or its legal effect considered as a contract. In *McCabe v. Blymyry*, 9 Phila. Rep. 615, the controversy was with respect to the rights of a mortgagee under a chattel mortgage. The mortgage had been made and recorded in Maryland, where the chattel was when the mortgage was given, and by the law of Maryland was valid though the mortgagor retained possession. The chattel was afterwards brought into Pennsylvania, and the Pennsylvania court held that the mortgage, though valid in the State where it was made, would not be enforced by the courts of Pennsylvania as against a creditor or purchaser who had acquired rights in the property after it had been brought to that State; that the mortgagee, by allowing the mortgagor to retain possession of the property and bring it into Pennsylvania, and exercise notorious acts of ownership, lost his right under the mortgage as against an intervening Pennsylvania creditor or purchaser, on the ground that the contract was in contravention of the law and policy of that State. Under substantially the same state of facts this court sustained the title of a mortgagee under a mortgage made in another State, as against a *bona fide* purchaser who had bought the property of the mortgagor in this State, for the reason that the possession of the chattel by the mortgagor was not in contravention of the public policy of this State. *Parr v. Brady*, 8 Vroom, 201.

The public policy which has given rise to the doctrine of the Pennsylvania courts is local, and the law which gives effect to it is also local, and has no extraterritorial effect. In the case in hand the safe was removed to this State by Schwartz as soon as he became the purchaser. His possession under the contract has been exclusively in this State. That possession violated no public policy, — not the public policy of Pennsylvania, for the possession was not in that State; nor the public policy of this State, for in this State possession under a conditional sale is regarded as lawful, and does not invalidate the vendor's title unless impeached for actual fraud. If the right of a purchaser, under a purchase in this State, to avoid the reserved title in the original vendor on such grounds be conceded, the same right must be extended to creditors buying under a judgment and execution in this State; for, by the law of Pennsylvania, creditors and *bona fide* purchasers are put upon the same footing. Neither on principle nor on considerations of convenience or public policy can such a right be conceded. Under such a condition of the law confusion and uncertainty in the title to property would be introduced, and the transmission of the title to movable property, the situs of which is in this State, would depend, not upon our laws, but upon the laws and public policy of sister States or foreign countries. A purchaser of chattels in this State, which his vendor had obtained in New York or in most of our sister States under a contract of conditional sale, would take no title; if obtained under a conditional sale in Pennsylvania, his title would be good; and the same uncertainty would exist in the title of purchasers of property so circumstanced at a sale under judgment and execution.

The title was in the safe company when the property in dispute was removed from the State of Pennsylvania. Whatever might impair that title — the continued possession and exercise of acts of ownership over it by Schwartz and the purchase by Norton — occurred in this State. The legal effect and consequences of those acts must be adjudged by the law of this State. By the law of this State it was not illegal nor contrary to public policy for the company to leave Schwartz in possession as ostensible owner, and no forfeiture of the company's title could result therefrom. By the law of this State Norton, by his purchase, acquired only such title as Schwartz had under his contract with the company. Nothing has occurred which, by our law, will give him a better title.

*The judgment should be reversed.*<sup>1</sup>

## CLEVELAND MACHINE WORKS v. LANG.

SUPREME COURT OF NEW HAMPSHIRE. 1892.

[Reported 67 *New Hampshire*, 348.]

REFLEVIN for two machines situate in the Granite Mills in Northfield, and attached as both real and personal estate by the defendant, a deputy sheriff, on a writ in favor of Denny, Rice & Co. against Edward P. Parsons. The negotiations for the machines were had and completed with the plaintiffs in Worcester, Mass., by one Green, as agent for Parsons, who resided in Boston. The machines were shipped by the plaintiff from Worcester to Northfield, and were there set up by an employee of the plaintiff, under an agreement by which the title to the machines was to remain in the plaintiff until the entire price was paid. Parsons never paid for the machines. At the time of the Denny, Rice & Co. attachment neither they nor the defendant had notice of the plaintiff's lien.<sup>2</sup>

CLARK, J. By the terms of the contract the machines were to remain the property of the Cleveland Machine Works until paid for. The contract was negotiated in Massachusetts, by citizens of Massachusetts, respecting property situated in Massachusetts. The shipment of the machines at Worcester — Parsons paying the freight from that point — made Worcester the place of delivery, and vested in Parsons all the right and interest he ever acquired in the property. The agreement to send a man to set up the machines at Northfield was not a condition precedent to the vesting of the conditional title in Parsons, any more than an agreement to furnish instruction as to the mode of operating the machines would have been. The written agreement

<sup>1</sup> *Acc. Weinstein v. Freyer*. 93 Ala. 257; *Public Parks Amusement Co. v. Carriage Co.*, 64 Ark. 29, 40 S. W. 582. — Ed.

<sup>2</sup> This statement is condensed from that of the Reporter. Arguments of counsel are omitted. — Ed.

shows that the parties understood that the conditional title passed upon the shipment of the machines, by fixing the times of payment from that date. The contract was a conditional sale of chattels in Massachusetts, negotiated and completed there by Massachusetts parties, and valid by the law of Massachusetts; and being valid where it was made, its validity was not affected by the subsequent removal of the property to New Hampshire. *Sessions v. Little*, 9 N. H. 271; *Smith v. Godfrey*, 28 N. H. 379; *Stevens v. Norris*, 30 N. H. 466.

As a general rule, contracts respecting the sale or transfer of personal property, valid where made and where the property is situated, will be upheld and enforced in another State or country, although not executed according to the law of the latter State, unless such enforcement would be in contravention of positive law and public interests. A personal mortgage of property in another State, executed and recorded according to the laws of that State, is valid against the creditors of the mortgagor attaching the property in this State, although the mortgage is not recorded here. *Offutt v. Flagg*, 10 N. H. 46; *Ferguson v. Clifford*, 37 N. H. 86. A mortgagor of horses in Massachusetts, bringing them into this State, cannot subject them to a lien for their keeping against the Massachusetts mortgagee. *Sargent v. Usher*, 55 N. H. 287. A boarding-house keeper's lien under the laws of Massachusetts is not lost by bringing the property into this State. *Jaquith v. American Express Co.*, 60 N. H. 61.

Formerly by the law of Vermont a chattel mortgage was invalid against creditors of the mortgagor if the property remained in his possession. But it was held both in Vermont and in New Hampshire that a mortgage of personal property in New Hampshire, duly executed and recorded according to the law of New Hampshire, was valid against creditors of the mortgagor attaching the property in his possession in Vermont. *Cobb v. Buswell*, 37 Vt. 337; *Lathe v. Schoff*, 60 N. H. 34. In *Cobb v. Buswell* the property was taken to Vermont with the consent of the mortgagee, and in *Lathe v. Schoff* it was understood, when the mortgage was executed, that the horses mortgaged were to be removed to Vermont by the mortgagor and kept there after the season of summer travel closed. So a chattel mortgage made by a citizen of Massachusetts temporarily in New York with the mortgaged property, if valid by the law of New York, is valid against the creditors of the mortgagor attaching the property in his possession in Massachusetts. *Langworthy v. Little*, 12 Cush. 109.

The law of New Hampshire respecting conditional sales has no extra-territorial force, and does not apply to sales made out of the State. Neither the parties nor the subject-matter of the contract respecting the machines were within its operation. If the conditional sale had been made in this State before the statute was enacted requiring an affidavit of the good faith of the transaction and a record in the town clerk's office, it would not have been affected by the statute. When the machines were brought to this State, there was no provision of the

statute for recording the plaintiffs' lien. There was no change or transfer of title in this State, and the title of the plaintiffs, valid against creditors under a contract completed in Massachusetts, was not destroyed by the removal of the property to New Hampshire.

*Smith v. Moore*, 11 N. H. 55, cited by the defendant as sustaining the position that the plaintiffs' lien was destroyed because there was no law in this State providing for a record in such a case, is an authority against the defendant. In that case the property was in this State when the mortgage was made, the mortgagor residing out of the State. The court say, "If the property had been situated out of the State when the mortgage was made, and the mortgage had been valid according to the law of the place, a subsequent removal of the property to this State would not have affected its validity," citing *Offutt v. Flagg*, 10 N. H. 46.

Conditional sales were valid in this State without record until January 1, 1886. *McFarland v. Farmer*, 42 N. H. 386; *Holt v. Holt*, 58 N. H. 276; *Weeks v. Pike*, 60 N. H. 447. The statute of 1885, c. 30, had no application to contracts between parties residing out of the State, and made no provision for recording such contracts. The fact that the contract is not within the statute is an answer to the position that the plaintiffs' title is to be tested by the law of New Hampshire.

The attachment of the real estate gave the defendant no possession of or right of property in the machines. *Scott v. Manchester Print Works*, 44 N. H. 507. By attaching them as personal property, the defendant claims to hold the possession and property in them, as the property of Parsons, for the benefit of the attaching creditors. If Parsons had an attachable interest subject to the plaintiffs' lien, the defendant's claim to hold the entire property under the attachment entitles the plaintiffs to maintain replevin, if they have any title to the machines and there is no estoppel. As between the plaintiffs and Parsons, the machines were the property of the plaintiffs. They were never the property of Parsons. He was simply a bailee, and never claimed to own them.

"Judgment and execution liens attach to the defendant's real, instead of his apparent, interest in the property. It follows from this that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto and before the sale." *Freem. Ex.*, § 335. A purchaser at a sheriff's sale, there being no estoppel, acquires no title to property not belonging to the debtor. *Bryant v. Whitchee*, 52 N. H. 158.

An attaching creditor is not in the position of a purchaser for a valuable consideration without notice of any defect of title. The defendant, and the creditors of Parsons whom he represents, do not occupy the relation of *bona fide* vendees or mortgagees for value without notice. They stand no better than Parsons, who never owned or claimed to own the machines. Their claim to hold the property against the plaintiffs'

title is based upon Parsons's ownership, and not upon any attempted transfer of title by him to them; and as he had no title they took nothing by the attachment.

The case has no analogy to an attachment of property to which the debtor has a voidable title valid until rescinded (*Bradley v. Obear*, 10 N. H. 477), or to the numerous class of cases where the debtor once had a valid title which he has conveyed or transferred in fraud of creditors.

As Parsons had no title to the machines, and as no legal or equitable ground of estoppel to the assertion of the plaintiffs' title is shown, the plaintiffs are entitled to judgment.

*Judgment for the plaintiffs.*<sup>1</sup>

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### KNOWLES LOOM WORKS v. VACHER.

SUPREME COURT, NEW JERSEY. 1895.

[*Reported 57 New Jersey Law, 490.*]

THIS suit relates to the title of ten silk looms which, about August 1st, 1893, were in the possession of the defendants, and were then replevied by the plaintiff, and returned under bond to the defendants.

The value of the looms was then \$1,487.50, which amount, with interest thereon, from August 1, 1893, the plaintiff will be entitled to recover if it be entitled to a judgment. The looms were originally the property of the plaintiff, a Massachusetts corporation, located in Worcester, Massachusetts, and were delivered by it to the Paris Silk Company, a New Jersey corporation, located in Paterson, under a contract for the sale of them made orally in the city of New York between an agent of the plaintiff and an agent of the Paris Silk Company. According to the terms of the contract the looms were to remain the property of the plaintiff until they were fully paid for, and were to be paid for in instalments, at periods ranging from thirty days to six months after delivery.

This contract was never formally reduced to writing, but its terms can be gathered from letters written to each other by the parties in Worcester and Paterson, which refer to the oral contract.

In pursuance of the contract, the looms were delivered by the plaintiff to the silk company, in Paterson, in the latter part of May, 1893, and shortly afterwards notes were given by the silk company to the plaintiff for the amount of the purchase-money. Those notes have never been paid, and after the maturity of the note first due the plain-

<sup>1</sup> *Acc. G. A. Gray Co. v. Taylor Bros. Iron-Works Co.* 66 Fed. 686; *Drew v. Smith*, 59 Me. 393; *Barrett v. Kelley*, 66 Vt. 515, 29 Atl. 809; *Mershon v. Moors*, 76 Wis. 502. See *Ensley L. Co. v. Lewis*, 121 Ala. 94, 25 So. 729. — ED.

tiff tendered them all back to the silk company before issuing the writ in this cause. On July 5, 1893, the looms being in the possession of the Paris Silk Company, at Paterson, were mortgaged by that company to the defendant Hoguet, to secure a pre-existing debt due from the company to Hoguet, Mr. Hoguet having agreed with the company that whatever he realized from the mortgage he would distribute among the creditors of the Paris Silk Company proportionately. At that time the silk company was insolvent, and Hoguet knew it, but he had no notice that the looms were not the property of the Paris Silk Company. The title which the defendants now set up depends upon that mortgage. Whether, under these circumstances, the plaintiff or the defendants are entitled to the judgment of the court, is a question reserved and certified to the Supreme Court for its advisory opinion.

VAN SYCKEL, J.<sup>1</sup> On behalf of the defendants, it is insisted that the sale by the plaintiff to the silk company, being a conditional one, was void as against the mortgage of Hoguet by virtue of the provisions of the act of May 9, 1889, entitled "An act requiring contracts for the conditional sale of personal property to be recorded." Pamph. L., p. 421. . . .

The silk company was the party contracting to buy, and was a resident of this State, located at the city of Paterson, in the county of Passaic. The contract of sale was not recorded, as required by the act of 1889.

Two points are involved :

First, whether the statute of 1889 is applicable to this case, in view of the fact that the contract of sale was made in the State of New York ; and, second, whether the defendant Hoguet, in taking a mortgage to secure a pre-existing debt due from the Paris Silk Company to him, became a mortgagee in good faith.

The act of 1889 directs the contract to be recorded in the county where the buyer resides, if a resident of this State at the time of the execution of the contract, and if not a resident of this State, then in the county where the property shall be at the time of the execution of such instrument.

The manifest purpose of the act is to render inefficacious the conditional sale of all goods held in this State where the contract of sale is not recorded.

There is an implied mandate in the act that the contract of sale shall be in writing, otherwise it could not be recorded and the act would be futile.

The situs of the property, and not the *lex loci contractus*, determines the validity of such sales.

The contract in this case was made in New York, but the property was to be delivered, and was delivered to, and held by the purchaser in this State.

Great contention and uncertainty as to the title to personal property

<sup>1</sup> Part of the opinion is omitted. — Ed.



would be produced if purchasers and mortgagees were bound to ascertain whether the vendor or mortgagor acquired title in another State before they could contract with safety in reference to it.

Judicial decision in this State has been hostile to such an interpretation of the law. *Marvin Safe Co. v. Norton*, 19 Vroom, 410.

Where the situs of personal property is in this State, it is subject to our statutory provisions in the adjudications regarding it in our own courts, in a suit to which a citizen of this State is a party.

The force of our statutes is recognized in *Varnum v. Camp*, 1 Gr. 326, and in *Bentley v. Whittemore*, 4 C. E. Gr. 462.

"No one can seriously doubt that it is competent for any State to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its own territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and grantors, be deemed justly open to reproach of being founded in a narrow or selfish policy." Story, *Confl. L.*, § 390.

It seems clear that the New Jersey statute must dominate this controversy. . . .

The Circuit Court should be advised that the subsequent mortgagee is entitled to judgment.<sup>1</sup>

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### MASURY v. ARKANSAS NATIONAL BANK.

CIRCUIT COURT OF THE UNITED STATES, E. DISTRICT ARKANSAS. 1898.

[Reported 87 *Federal Reporter*, 381.]

THIS is a bill in equity by Grace Masury against the Arkansas National Bank and others to cancel a sheriff's sale of shares in a corporation, and to declare and foreclose a lien on the stock. The cause was heard on demurrer to the bill.

WILLIAMS, District Judge.<sup>2</sup> The only questions involved are whether, under the statutes of Arkansas, a seizure of shares of the capital stock of a corporation existing under the laws of that State, by virtue of a writ of attachment, or under execution, takes precedence over a prior transfer or pledge, not transferred on the books of the corporation, nor filed for record in the office of the county clerk of the county in which the corporation transacts its business, and whether the laws of this State govern such a transfer, if made in another State. As to the last proposition, learned counsel for complainant claim that *Black v. Zacharie*, 3 How. 483, is conclusive that the laws of New York, where the transfer was made, and not the laws of Arkansas, of which State the company was a corporation, control. The question involved in that

<sup>1</sup> *Acc. In re Legg*, 96 Fed. 326; *De la Vergne R. M. Co. v. R. R.*, 51 La. Ann. 1733, 26 So. 455. — Ed.

<sup>2</sup> Part of the opinion only is given. — Ed.

suit was not that of a transfer of shares, but an assignment of the equity of redemption in stock previously assigned and delivered as a pledge. The court say :

“ We admit that the validity of this assignment to pass the right to Black in the stock attached depends upon the laws of Louisiana [the domicil of the corporation], and not upon that of South Carolina [where the assignment was made]. From the nature of the stock of a corporation, which is created by and under the authority of a State, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that State, and not by the local law of any foreign State.”

Judge Lowell, speaking of the same subject, says :

“ Whatever the general principles of international law in relation to assignments of personal claims may be, the validity of a transfer of stock is governed by the law of the place where the corporation is created.” Lowell, *Stocks*, § 50 ; *Hammond v. Hastings*, 134 U. S. 401, 10 Sup. Ct. 727 ; *Green v. Van Buskirk*, 7 Wall. 140.

I am therefore of the opinion that, unless the transfer of this stock is valid under the laws of Arkansas, the State which created the corporation, the laws of the State where the transfer was actually made cannot control.

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## IN RE QUEENSLAND MERCANTILE AND AGENCY COMPANY.

CHANCERY DIVISION. 1891.

[*Reported* [1891] 1 *Chancery Division*, 536.]

THIS was the hearing of two summonses in the winding-up in England of an Australian company, which was also being wound up in Australia.

One summons was by the Union Bank of Australia, Limited, an English company, that the English liquidator might be ordered to transfer to them the sums of New Consols and cash standing in his name, representing the proceeds of calls in his hands in respect of shares in the company being wound up, numbered 1 to 2,500 inclusively.

The other summons was by the Australasian Investment Company, that out of the sum of £24,730 12s. 2d. New Consols and any cash in his hands or in court representing money received from Scotch shareholders in the company in liquidation, the sum of £12,666 4s. 5d. might be paid to the applicants in priority over all other payments out of the said funds. This summons also asked that, if necessary, a case might be remitted to the Court of Session in Scotland, under the statute 22 & 23 Vict. c. 63, § 1, for the purpose of ascertaining the law of Scotland relative to matters of Scotch law involved.

The Queensland and Mercantile and Agency Company was registered in Brisbane, and for several years before it was wound up carried on business in Queensland. The bankers of that company were the Union Bank of Australia, who, on the 28th of June, and the 3d of September, 1866, took from the Queensland Company two debentures of £10,000 and £50,000 respectively in similar form, whereby the payment of such debentures was made a first charge on the uncalled capital made receivable in respect of shares numbered from 1 to 2,500 in the Queensland Company, upon each of which shares £50 had been paid up and £50 more remained uncalled.

In December, 1886, the company passed resolutions calling up the balance of £50 per share, payable by equal instalments in February, April, June, and August, 1887, respectively. Notice of the call was given to the shareholders, but they never had any notice of the charge effected by the said two debentures in favor of the Union Bank. On the 24th of February, 1887, a Scotch company, called the Australasian Investment Company, commenced an action in Scotland against the Queensland Company for negligence, and immediately afterwards, on the same day issued a Scotch process known as arrestment on the dependence of the action, against numerous holders of the Queensland Company's shares who were resident in Scotland, the effect of which was that the calls payable by them to the Queensland Company were arrested in their hands, and the Australasian Company (the Pursuers in the action) became secured creditors on the funds so arrested for the amounts for which they should establish their claim in the action. By the terms of the order of arrestment the sums arrested were required "to remain in the hands of the arrestees under sure fence and arrestment at the instance of the Pursuers, aye and until sufficient caution and surety be found acted in the books of Council and Session that the same shall be made forthcoming to the said Pursuers as accords of law conform to the summons in all points."

In the months of May, July, and August, 1887, judgments were recovered in England in twenty-seven actions by one Drake and others against the Queensland Company. On the 2d of September, 1887, the Union Bank commenced an action in England against the Queensland Company in respect of money due to them other than that secured by the two debentures, and on the 7th of September an order was made in all those actions for the appointment of a receiver to get in the calls from the shareholders in the Queensland Company.

On the 28th of October, 1887, an order was made in Queensland for the winding-up of the Queensland Company, and thereupon the £60,000 secured by the two debentures above mentioned became payable. On the 14th of January, 1888, a similar order was made in England. By various proceedings and orders in England and in Scotland, to which it is not necessary to refer in detail, the Australasian Company were restrained from further prosecuting their action in Scotland, but without prejudice to the security, if any, upon the amounts payable by the

Scotch shareholders in the Queensland Company in respect of the said calls which the Australasian Company had acquired by the proceedings taken by them in Scotland; and the official liquidator received from the receiver, or himself collected, and now held on separate accounts the amounts paid for calls by the Scotch and English shareholders respectively, the receipts from the Scotch shareholders being about £24,730. By proceedings in the winding-up in Queensland the amounts due from the Queensland Company to the Union Bank were ascertained at upwards of £74,000; but it was admitted that, after allowing for securities held by them, their claim was reduced in round figures to £31,000.

On the hearing of the summonses the Union Bank asked for an order upon the official liquidator to transfer to them on account of their claim the sums he has thus received in respect of the shares numbered 1 to 2,500, including those received from the Scotch shareholders. The Australasian Company claimed, on the other hand, to be first paid out of the moneys received from the Scotch shareholders, £12,666 4s. 5d., which had been found in the English winding-up to be the amount of the claim due to them. The plaintiffs in the actions of Drake and others against the Queensland Company also asserted a claim to the funds in hand against both the Union Bank and the Australasian Company, upon the ground that as against them the debentures were inoperative.

The only evidence of the law of Scotland bearing on the matters in question was contained in an affidavit made in the matter by John Blair, writer to the signet, a member of the firm in Edinburgh who were the solicitors of the Australasian Investment Company. The effect of it is stated in the judgment.<sup>1</sup>

NORTH, J. (after stating the facts as above, and reading parts of Mr. Blair's affidavit, continued). It is not satisfactory to me to find that the only evidence in this case of the Scotch law is contained in an affidavit by Mr. Blair, the legal adviser of the Australasian Company, and that, although there is no evidence contradicting it, the Union Bank state that they will, if necessary, contend before the House of Lords that such affidavit lays down the Scotch law incorrectly. This may be open before their Lordships on appeal, but it is not open before me, for the question of Scotch law is here merely a question of fact, upon which the evidence is all one way, and the Union Bank have not asked me to give them an opportunity of going into further evidence or to send a case for the opinion of the Scotch court. By such evidence it is established that there is, by virtue of the arrestment, what is equivalent to an actual assignment of the calls in question duly intimated, and that this, by the law of Scotland, is preferable to and has priority over the assignment of the Union Bank, of which, though prior in time to the arrestment, no intimation had

<sup>1</sup> The tenor of the debentures and arguments of counsel are omitted. — ED.

been given at the date when the assignment by arrestment became complete; and this is what I feel bound to decide.

It was contended on behalf of the Union Bank that the claim of the Australasian Company could only be valid as against "the sums attached," which was said to be what would remain of the calls after satisfying what was due to the Union Bank; but this is quite inconsistent with the language of the arrestment, which applies specifically to the whole sum due for calls from each of the shareholders on whom the arrestment was served. It was also said that after the assignment to the Union Bank all that the Queensland Company had left was the surplus remaining over after paying the bank, that the rest of the calls belonged to the bank, and that it was contrary to principle and authority to hold that a process of law against the debtor could affect what was the property of the creditor, the Union Bank. But in the present case I have not to deal with a mere process of law, such as a judgment or garnishee order, but with what is established as a fact to be equivalent to an actual assignment, and which on the evidence I must treat in exactly the same way as if such an assignment had been actually executed and intimated.

But the Union Bank also put their claim to priority over the Australasian Company in another way. They say that whatever the position of matters might have been if all the parties to these transactions had been domiciled in Scotland, the facts are not so; that the Queensland Company were creditors in respect of the debt due from the shareholders for calls; that this company was domiciled in Queensland, and therefore the validity of the assignment by them to the Union Bank depends upon the law of Queensland, and not on the law of the Scotch debtor's residence; that by the law of Queensland (which is admitted to agree with that of England), no notice or intimation was necessary; and that a transfer of personal or movable property, valid by the law of the owner's domicile, is valid wherever the property is situated. They rely on the principle concisely expressed in the maxim, *Mobilia sequuntur personam*, and more fully stated in numerous authorities, of which it is sufficient that I should refer to one, viz., the judgment of Lord Loughborough in *Sill v. Worswick*, 1 H. Bl. 690. He says this: "It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession."

In my view, after full consideration, it is not necessary for me to

express any opinion on this interesting and difficult question; for, assuming the principle above stated to include such a case as the present, there is another equally well-known rule of law, viz., that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled. To give an instance. According to Scotch law, it is necessary, in order to give a charge on corporeal movables, that they should be delivered to and placed in the possession of the creditor. But, if a domiciled Scotchman resident in London gave a duly registered bill of sale of the furniture of his house, that would be a complete and effectual transfer of the property without its being delivered to the creditor, notwithstanding that such a disposition of furniture in Scotland would have been ineffectual without delivery. To apply this to the present case, the Queensland Company did certain acts (by commission or omission), by virtue of which certain legal rights arose in Scotland, having identically the same effect in all respects (according to the evidence before me) as if the Queensland Company had on the date of the arrestment executed an assignment of the calls in question to the Australasian Company, and such assignment had been forthwith intimated to the persons in whose hands the calls were arrested. Such an assignment would, according to the evidence, clearly have been preferred to another assignment bearing, indeed, an earlier date, but not completed by intimation; and, in my opinion, the right of those who have acquired an unexceptionable title, and have recovered the property according to the law of the country where it is found and arrested, cannot be defeated by showing that if the property had been elsewhere the title of the Union Bank might have been the preferable one. I speak of the Australasian Company as having recovered the calls, although they have, as matter of convenience, been received by the official liquidator, because they would have actually received them if the action had not been stayed, and the rights of the parties cannot be affected by the court having stayed the action, as by the order staying the action their right or security was expressly left unprejudiced. The terms of the order will require some care, in dealing with the figures; but in substance I accede to the summons of the Australasian Company, and only direct the payment of the balance of the Scotch calls to the Union Bank. There will be an order on both summonses, and the Australasian Company and Union Bank will add their costs to their respective securities. The official liquidator's costs must be retained by him out of the calls in his hands.

## CARTER v. MUTUAL LIFE INSURANCE COMPANY.

SUPREME COURT OF THE HAWAIIAN ISLANDS. 1896.

[Reported 10 *Hawaiian Reports*, 559.]

FREAR, J.<sup>1</sup> This is an action on a policy of insurance issued by the defendant company upon the life of Henri G. McGrew for \$5,000, payable upon his death to "Alphonsine McGrew, wife of Henri G. McGrew . . . if living, if not living to his executors, administrators, or assigns." The company stands ready to pay the money, but desires that it be first judicially determined who is entitled to it, — whether Alphonsine McGrew or the administrator of the insured. The doubt upon this point is occasioned by the fact that the insured prior to his decease obtained a decree of divorce from his wife on the ground of adultery, the validity and effect of which decree are questioned.

The contract of insurance was entered into in the Hawaiian Islands: the policy is dated September 14, 1892; it was issued to Henri G. McGrew upon his application; he retained possession of it and paid all premiums upon it; he died October 22, 1894; at the time of entering into the contract and until his death he was a subject and resident of and domiciled in these islands; J. O. Carter is the duly appointed administrator of his estate: all conditions and requirements necessary to be performed or complied with by the decedent or plaintiff have been performed and complied with.

The former decision in this case was filed August 15, 1895. On October 4, 1895, new counsel for the defendant filed a motion for a rehearing, based on a number of grounds therein set forth. . . .

The first point relied on is, that the court manifestly erred in construing the policy as a Hawaiian contract, whereas it appears upon its face to be a New York contract. . . . And this seems to be the source of misunderstanding in this case. Construction is confused with ownership. If A had possession of certain personal property under a contract it might be a question of the construction of the contract whether A's interest was in his own right, and, if so, what that interest was, or if A had died, it might be a question of construction, whether the property should then pass to A's representatives or to some one else. These questions would be decided by the law of the place of contract. But suppose the contract were construed as having passed the property absolutely to A and his representatives, the further question who were the representatives would be one, not of construction, but of distribution, to be solved by the law of the place, not of the contract, but of A's domicile. Or, suppose A had previously assigned the property, his representatives would not take at all, — not because of an erroneous

<sup>1</sup> The first two paragraphs of the opinion are taken from the original opinion. Part of the opinion is omitted. — Ed.

construction of the contract by the law of domicile or any other law, but because the ownership of the property had changed, — a question which might necessarily be determined by some other law, as the law of the place of assignment, if that were a different place. So, if A had become bankrupt and the property had become assigned by operation of law to his assignee in bankruptcy. So, if A had married and the property had passed by law to her husband. So, as in this case, if a divorce had been obtained against her, and the property had thereupon passed to her husband by operation of law. To allow an assignee of a contract to recover, is not to vary the terms of the original contract, but to enforce the terms of the contract of assignment.

It is further argued, that, if the mere fact that the policy is a New York contract is not sufficient to require the New York law to govern in determining the question of assignment by operation of law, as distinguished from the question of construction, yet it is expressly provided in the policy that the New York law should govern, and it was competent for the parties to so agree. Let us assume that such an agreement, if made, would have been valid; . . . this could not mean that the New York statutory law should govern every question that might subsequently arise in relation to the policy, — its ownership, the court in which or the procedure by which it should be enforced, the persons who would be the insured's representatives in case he survived his wife, etc. Indeed, New York law must be assumed to include private international law, by which the effect of a divorce upon the ownership of personal property is determined by the law of the place of divorce, at least if that is also the place of domicile — the New York statute upon the subject so far as it relates to personal property being presumed to apply only to divorces granted in that State. In considering this question, it should be borne in mind that the specific provision in the policy relating to assignment is not involved.

The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits, — one by the administrator here, the other by the widow in California. It must now rely upon the assumption that the two courts will take the same view of the law. There can be no doubt that the same law should govern whether the action is brought in Hawaii, California, or New York. In our opinion, that law is the law of the place of domicile and divorce. We can only assume that the California court will take the same view. . . .

The next point is, that section 1331 did not apply to the property in question, because at the time of the divorce neither the wife nor the policy were in this country or within the jurisdiction of the court, the wife because she had gone to California, the policy, because, although it remained here in the possession of the husband, being personal property it followed its owner, the wife, in contemplation of law. We presume that by this is meant, not that personal property follows its owner wherever the latter may happen to go temporarily, but that it is



governed by the law of the owner's domicil, or residence *animo manendi*. Now there was no proof whatever that the wife in this case intended to change her domicil, which had previously been here, and which, in the absence of proof to the contrary, would, at least after so short an absence, be presumed to continue here, to say nothing of the rule that the wife's domicil is that of her husband, except under certain special circumstances. But however that may be, both parties were undoubtedly domiciled here when the divorce proceedings were commenced and when the court acquired jurisdiction over them, and that was sufficient so far as the question of domicil was concerned. The court having acquired jurisdiction under these circumstances the incidents of the divorce would follow according to the law of the place of divorce.

*The motion for the rehearing is denied.*

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BADIN v. HEIRS OF AYME.

COURT OF CASSATION, FRANCE. 1815.

[Reported 5 Sirey Recueil Général I. 47.]

MARTHE AYME, French by origin, had left her native country to live at Avignon, then under the sovereignty of the Pope. She made at Avignon, on the 5th of July, 1784, to Marie Bouillet-Badin, a cumulative gift of all her property then owned or to be acquired, reserving the use of it during life and the sum of 200 francs at her own sole disposal. Shortly after, Marthe Ayme returned to France, and on the 11th of May, 1785, she made there in favor of her nephews a new gift of all property then owned by her, and also a will by which she created them her heirs. In the course of the same year she brought suit against Marie Bouillet-Badin for revocation of the gift of July 5, 1784, on the ground that it included after-acquired property, contrary to the French ordinance of 1731. She died June 4, 1786.

Marie Bouillet-Badin averred that the gift was valid, because made in a country where the ordinance was not in force, but only the Roman law, which permitted such gifts even outside marriage, provided the donor do not entirely despoil himself, that is, retain full power over some property. Here the entire use had been reserved for life, together with absolute power over 200 francs.

The property in question was situated in France.

The Tribunal of First Instance, the 16th Thermidor, Year 6, adjudged the gift valid. On appeal the Civil Tribunal of the Department of the Gard, 5th Frimaire, Year 8, reversed the judgment. Dame Badin brought error in Cassation.<sup>1</sup>

<sup>1</sup> This statement of facts is condensed from that of the Reporter. — Ed.

THE COURT. The principle here involved is that prohibitory laws, that is, such as forbid the transfer of property, either wholly or in part or under specified circumstances, constitute statutes real which directly affect the property, and restrain the proprietor's liberty of disposal whatever be his domicile. Of this sort is Article 15 of the Ordinance of 1731; in fact, this article clearly belongs to the class of statutes real, since it forbids gifts *inter vivos* (except when made in a marriage contract) of property in possession and after acquired. The judgment therefore should annul, as it has done, the gift in litigation, since it is a cumulative disposition of property both present and future, so far as it covers property situated in France and therefore subject to the Ordinance of 1731.

*Appeal rejected.*

### MAHLER v. SCHIRMER AND SCHLICK.

REICHS-OBERHANDELSGERICHT. 1872.

[Reported 6 *Entscheidungen des R. O. H. G.* 80.]

THE Elbe steamboat "Borussia," belonging to the shipowner Charles S. of Torgau, lay at anchor in Dresden in May, 1868, when she was attached at suit of the firm of Schirmer & Schlick of Leipzig on account of a loan; the next September execution was issued against the vessel by authority of the same court for the same firm upon a claim on a bill of exchange, but the sale of the vessel was stayed.

Against this execution the petitioner Mahler intervened. The "Borussia," as he alleged, on Michaelmas, 1865, was mortgaged to him at Torgau in the method there required by law, that is, by the minute of a notary upon the bill of exchange, for a debt of 5000 thalers.

The judge of first instance admitted the binding force of the alleged mortgage; the Court of Appeal denied its force in the Kingdom of Saxony. The R. O. H. G. agreed with the judge of first instance for the following reasons.

THE COURT. Section 10 of the Saxon Civil Code provides: "The title to movable and immovable property, as well as the right of possession, shall be decided according to the law of the situs of said property." The previous lively dispute whether in the case of movables the law of the domicile of the owner or the law of the situs of the property should prevail is settled by this section in favor of the second alternative, whilst the Prussian, Austrian, and French codes are based upon the acceptance of the first. But the place where the property is at the time of the judicial decision is not all-important for the application of section 10; both lower courts have conclusively proved this. Neither according to the letter nor to the spirit of the statute may it be held that, by judicial determination of the title to property, a conveyance which has previously been executed in accordance with the local *lex*

*rei sitæ* at the place where the thing then was may be regarded as a mere nullity because it is not according to the law of the forum. For the universal rule (especially recognized for Saxon law by von Siebenhaar in his Commentary, Vol. 1, p. 49, note 2) is that all juristic facts are to be adjudged according to the law of the place where they occurred. Legal acts, therefore, when they are in the category of already accomplished facts in one country, are recognized as such in every other country. The situation will of course be altered if a third person acquires an independent title in the thing at the place to which it is brought later; for the determination of such a title the local law governs, according to section 10 of the Code. And if the right acquired within the country conflicts with that before acquired abroad, the local law prevails with respect to the substantive right.

The Saxon judge may therefore be in a position to subject to the claims of his local law the decision of lawsuits about movables; but the admissibility of such subjection always depends on the actual assumption that the things have come within the jurisdiction of the Saxon law. The things must be situated within Saxony. But the momentary position is not entirely decisive; there are things which are constantly changing their position without thereby losing their legal relation to the place from which they started. This is especially true of the most important instruments of transportation, ships and railroad trains. During their journeys they touch at foreign places only in passing, with the intention of returning to the place where their legal relations are situated. The recognition of this place of departure as the place that governs their legal relations seems to be enjoined by practical necessity. Without this recognition intercourse between different countries would not be practicable, and an insecurity of rights would ensue in opposition to the necessities of modern law. This doctrine is already established with regard to sea-going vessels; the same principle must however by analogy apply in substance to river boats. Vessels form (as von Goldschmidt has strikingly remarked, Handbook of Commercial Law, § 60, p. 527) as it were the immovables of commerce and are in many ways subject to the law of immovables. They have, according to this theory, in the maritime clauses of the Commercial Code, a fixed situation like real estate, a quasi-domicil, namely the home port, which constitutes the juridical centre of the outfit (Goldschmidt, *op. cit.*, note 8). From this point of view the "Borussia" had the centre of her legal relations in the kingdom of Prussia.

The boat, as has been said, lay at anchor in Dresden while passing on a longer voyage, when at suit of Schirmer & Schlick, the defendants in the intervention, she was attached, in May, 1868, by the Saxon judge. Her owner was an inhabitant of Torgau, and a Prussian subject. The complete execution, in September, 1868, was only made possible by reason of the previous attachment of the vessel in Dresden, and this legal act enforced by the defendant was probably the only thing that kept the vessel in the Saxon dominions, as it probably also required

the further stay of the owner in Dresden. The ship's papers were all issued by authority of the Prussian State. The ship belonged to that State with respect to its juridical relations. This is the more certain that according to the treaty concluded between Prussia and Saxony with reference to the navigation of the Elbe it was expressly provided that Prussian vessels, even while they were within Saxony, should still form part of the Prussian merchant-marine (Art. iv. of the Elbschiff-fahrtsakte of June 23, 1821; Ges.-Sammlung 1823, p. 95: — Section 10 of the Additionalakte of April 13, 1844; Ges.-Sammlung 1844, p. 284: — Verordnung of February 16, 1866, as to the form of the manifest, etc.; Ges.-Sammlung, 1866, p. 49, at the words, "Each vessel must be plainly marked with the name of the place where she belongs," etc.) — a relation that according to section 11 of said Additionalakte is not lost by a change of situation of the vessel for the time being, but only when upon withdrawal of the ship's papers issued by one State the vessel joins the marine of the other. The acts furnish no support for the contention that a change has taken place in the registry of the "Borussia." It cannot be supposed that the vessel at the time of the execution had its location in Saxony in the sense of section 10 of the Civil Code. The situs of the legal relations of the vessel at the time of the attachment was likewise not in Dresden; and that process was therefore not calculated to subject the vessel to the exclusive jurisdiction of the Saxon law. This was recognized by von Siebenhaar (*op. cit.*, p. 49); in accordance with the constant practice he clearly holds that in the case of movables the law that governs is not under all circumstances the law of the place where they happen to be for the moment, but rather that of the place where, according to the intention of the owner, they are destined to remain; a case which arises especially when goods merely pass through Saxony in the post or on a railway, or when foreigners while on a journey bring goods with them into Saxony. The situs of all legal relations of the vessel "Borussia" was and continued to be in Prussia, even though its owner had not yet returned home. Therefore by reason of section 10, so much the less can the validity of the mortgage claimed by the intervenor be denied, because even from the standpoint of the Saxon law no real conflict is presented between the successive interests in the vessel.

## REYHER &amp; SCHINTZ v. GAUTREAU ET COMPAGNIE.

COURT OF APPEAL OF BRUSSELS. 1876.

[*Reported Pasicrisie Belge*, 1877, 2, 12.]

GAUTREAU & CIE. of Valparaiso obtained from the President of the Tribunal of Commerce of Antwerp, as creditors of the California Co. of Chili, authority to attach in the Port of Antwerp a cargo of nitrate of soda which had been laden in Peru on board the ship "Pride of Devon." Reyher & Schintz of Liverpool had bought at the Liverpool Exchange part of the cargo; and they brought suit in the Civil Tribunal of Antwerp to annul the attachment.

On July 14, 1876, the Tribunal gave judgment<sup>1</sup> sustaining the attachment. Appeal.

THE COURT. This court is not dealing with the order of the President of the Tribunal of Commerce of Antwerp, which authorized the attachment of the cargo of the "Pride of Devon," but with the petition for annulling said attachment, which has been effected in accordance with said order. . . .

Movables found on Belgian territory are governed, when considered individually, by Belgian law. The possessor in good faith, especially, is protected against a mere replevin suit by articles 2279 and 2280 of the Civil Code. This is exactly the case of the appellants Reyher & Schintz. They prove that they bought the cargo of the "Pride of Devon" on May 22, 1876, of Cox Brothers, brokers, at Liverpool, dealing in their own name, and that they regularly paid the purchase-money. As indorsees of the bill of lading (and to that extent of the goods) they sent it to Messrs. Kniewitz-Bleeckx & Cie., of Antwerp, to whom the goods were delivered as fast as landed, after the attachment. The appellees cite no foreign law which would be violated by the sale of May 22. The allegation (denied by the appellants) that the indorsement in blank of a bill of lading would not effect a transfer of title of a cargo according to the law of Peru is not in point, since the appellants bought at Liverpool, and it is clear that by English law the indorsement in blank passes title. In any case, in view of the sale of May 22, the indorsement of the bill of lading is no more than a delivery order given to the master, who held the merchandise for the appellants.

It results from what has been said that even if the law of Peru considers as a kind of theft the violation of legal attachment to which, it appears, the cargo of the "Pride of Devon" was subject at the port of embarkation, article 2280 of the Civil Code would relieve the appellants from the suit for restoration of the merchandise, since the appellees do not offer to reimburse the price paid by the appellants. Under these circumstances, the attachment cannot be maintained.

*Judgment reversed.*

<sup>1</sup> This judgment, and part of the judgment of the Court of Appeal, are omitted.  
—ED.

## COÛTEAUX FRÈRES v. VARTHALITI.

SPANISH CONSULAR COURT, CONSTANTINOPLE. 1892.

[Reported 20 *Clunet*, 447.]

VARTHALITI, a Spanish subject, had pledged various valuable securities to secure advances to him from the banking-house of Coûteaux Frères, of Belgian nationality. Varthaliti having been declared bankrupt, certain creditors attacked the validity of the pledge in the Spanish Consular Court, sitting as a bankruptcy court, on the ground that it was null as to them, not having been executed in accordance with Spanish law, the law of the court. They petitioned the court to declare that the securities were deposited in the bank in the course of business, and to bring them into the fund for the general creditors.

THE COURT. The principle *actus regit locum*, which the Advocate Galli invokes as the complement of the aphorism *locus regit actum*, is not to be admitted. We cannot apply to the present case article 1865 of the Civil Code;<sup>1</sup> to do so would be to establish a rule as false as prejudicial. If it were established, a Spanish subject knowing his own law and acting in bad faith, might apply on the eve of his failure at the establishment of a subject of another country, at the place where they both reside, for a loan or a credit for his own personal use, pledging as security valuable effects: being sure that at a certain time these valuable effects, by virtue of the article in question, would fall into the mass of his assets, for the benefit of his general creditors and to the obvious prejudice of the new creditor. Every subject of each nation could as well act in the same way, profiting in a foreign country by the Code under which he should have acted if he had been in his own country. If this doctrine were once admitted in a place like Constantinople, where commerce is carried on by subjects of every nation under the sun, the application of distinct laws to cases like this in question would produce such confusion that business would be paralyzed by the annulling of contracts.

As a result of facts of this sort, and by mutual agreement of nations which had once suffered from them, private international law came into existence, inspired by the necessity of admitting the effect of foreign laws. This law has the character of customary law, and its principles are distinguished by a number of statutes, namely: the statute personal, which affects persons; the statute real, which governs things; and the statute formal, which deals with forms. The statute formal is based on the principal *locus regit actum*, and in no manner on the principle *actus regit locum* which Advocate Galli would have applied. Article 11 of the Civil Code, invoked by Advocates G. Coûteaux and E. Degand in their arguments, to the effect that "forms and solemn-

<sup>1</sup> "A mortgage has no effect against third persons unless its execution is established by a public act."

ties of contracts, wills, and other public acts are governed by the laws of the countries where they are executed," implicitly deals with the statute formal, and the only principle applicable to the present case is therefore *locus regit actum*.

The Ottoman law of Medjele in force in this empire provides that "pledge is constituted by the simple declaration of consent of parties followed by delivery of possession of the thing pledged." Varthaliti acknowledged having delivered to Coûteaux Frères the valuable effects in question in pledge, as security for debts contracted with them. The aforesaid law of Medjele furnishes a rule for transactions of this kind, which are entered into daily by banks and money-lenders established here.

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## SECTION IV.

### TRUSTS.

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## LORD CRANSTOWN v. JOHNSTON.

CHANCERY. 1796.

[Reported 3 Vesey, 170.]

THE bill was filed upon the following case. After various dealings between the plaintiff and defendant previous to the year 1788, which produced a bill by the defendant, they agreed to an arbitration. Upon the 8th of July, 1789, an award was made, that Lord Cranstown should, upon the 1st of March, 1790, pay at Lloyd's Coffee House £2,521, 10s. 9d. At the time of the award the plaintiff was abroad, and he did not comply with it. He was entitled to the reversion upon the death of his mother of a plantation in the island of St. Christopher, the average product of which was £5,000 a year; and during the life of his mother he was entitled to an annuity of £300, charged upon that plantation. The defendant, immediately after the expiration of the time limited by the award, procured an agent to institute proceedings in the island against the plaintiff in his absence; and thereby obtained payment of the said annuity since the 25th of December, 1789. The plaintiff returned to England in 1791, and frequently offered to pay the defendant, and requested him to come to an account: but he refused to refund; and after the expiration of the time commenced an action in the Court of King's Bench and Common Pleas in the island, obtained judgment, and caused an execution to be taken out; and thereby the Deputy Provost Marshal of the island seized and put up to public sale the said rent-charge and reversion; and the defendant became the purchaser of both for £2,000 currency:

and a bill of sale and conveyance was executed to him by the said Deputy Provost Marshal, by means of which he was become entitled to his own use; and £2,000 currency being of the value of £1,200 sterling, he claims to have a personal demand for the remainder of the sum awarded.<sup>1</sup>

SIR RICHARD PEPPER ARDEN, MASTER OF THE ROLLS. This relief is sought upon the terms of paying all such sums of money as were due to the defendant at the time of the judgment, and the costs and expenses he was put to in procuring and carrying into effect that judgment; and I suppose, though it is not expressly stated, upon payment of all such incumbrances affecting the same estates as the defendant may have become entitled to. From the moment the case was opened, and after reading the evidence, there can be no question except as to the terms of the relief; for I confess, I never saw a case in which the relief sought was more clear; and I must forget the name of the court in which I sit if I refuse to grant it. . . . Such a picture of a sale under a judgment so insisted upon is such as I should not have thought could have been exhibited in a court of justice with a serious intention, supposing that any law of any country should be perverted to such a purpose.

It is material to see what was the law to which the defendant applied for enforcing payment. He could not with effect in this country; but he found out this interest in that island: where there was an act of assembly authorizing any creditor to proceed against an absent debtor by writ of summons, and in case the defendant shall secrete and conceal himself, so that the Provost Marshal or other person summoning cannot find him, then one summons and a copy of the declaration left at the last usual place of abode, or upon the freehold of the defendant, and another nailed up at the court-house door, shall be good and effectual. He thought fit to proceed on this law; and I must now suppose he had a right so to do, though the plaintiff, I think, was very ill advised for not trying whether any relief could be given in the island: a summons left upon the freehold, as it is called, of a person who had no freehold in possession; who had no tenant, upon whom this constructive notice could be served; and the creditor here knowing this avails himself of this law, which I do not mean to quarrel with: but neither that law nor any law in His Majesty's dominions could be, I hope, carried to the extent of authorizing a sale without either actual or constructive notice.

It is perfectly clear, the plaintiff had no conception that his estate was to be sold. He knew the defendant had a judgment, and thought it would be a security to him; and in the letter of the 4th of October hopes he will be content with that. . . .

Upon the whole it comes to this: that by a proceeding in the island an absentee's estate may be brought to sale, and for whatever in-

<sup>1</sup> The statement of evidence, arguments of counsel, and part of the opinion are omitted. — Ed.



terest he has, without any particular, upon which they are to bid: the question is, whether any court will permit the transaction to avail to that extent. It is said, this court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued very sensibly, that it is strange for this court to say, it is void by the laws of the island or for want of notice. I admit, I am bound to say, that according to those laws a creditor may do this. To that law he has had recourse. and wishes to avail himself of it; the question is, whether an English court will permit such a use to be made of the law of that island or any other country. It is sold, not to satisfy the debt, but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value, and to pay himself more than the debt, for which the suit was commenced, and for which only the sale could be holden. It was not much litigated that the courts of equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is, that this court cannot act upon the land directly, but acts upon the conscience of the person living here. *Archer v. Preston*, Lord Arglass *v. Muschamp*, Lord Kildare *v. Eustace*, 1 Eq. Abr. 133; 1 Vern. 75, 135, 419. Those cases clearly show, that with regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situated in England. Lord Hardwicke lays down the same doctrine, 3 Atk. 589. Therefore without affecting the jurisdiction of the courts there, or questioning the regularity of the proceedings as in a court of law, or saying that this sale would have been set aside either in law or equity there, I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws to proceed behind the back of the debtor upon a constructive notice, which could not operate to the only point to which a constructive notice ought, that there might be actual notice without wilful default: that he has gained an advantage, which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this: this court will not permit him to avail himself of the law of any other country to do what would be gross injustice.

It is said, what if the sale had been to a third person? I am glad I have not to determine that. A third person might have a great deal more to say than this defendant can. He might say the law of the island authorizes a lottery, and having bid he has a right to retain it. But this defendant has no such right except for the purpose of paying himself the debt. . . .

Therefore on payment of the money awarded, and such sums as the defendant has paid in the island, with interest at 5 per cent, he

must reconvey, subject to other incumbrances. Take an account of what is due for principal and interest, and also of what is due upon the payments of the annuity with interest, and reserve the costs.

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EX PARTE POLLARD. IN RE COURTNEY.

CHANCERY. 1840.

[*Reported Montague & Chitty's Reports*, 239.]

LORD COTTENHAM, L. C.<sup>1</sup> The short result of the facts of this case, as stated in the special case by which I am bound, is, that the bankrupts were absolutely entitled, as part of their partnership property, to some land in Scotland, the legal title being in George Courtney, one of the bankrupts; that the firm, being indebted to the petitioner, George Pollard, in order to induce him to give them further credit, deposited with him the disposition and instrument of seisin, being the title deeds of such lands, and signed and gave to him a memorandum in writing, dated the 13th of March, 1832, declaring that they thereby gave to Pollard a lien upon the land for the general balance of all or any monies that then were or might thereafter become due to him from them to the extent of £2,000, and they agreed that he should stand in the nature of an equitable mortgage thereof; and, on demand, they further agreed to make, do, and perfect all such acts for the better securing to him of any such monies as aforesaid; that Pollard, relying upon the security of the hereditaments so charged to him as aforesaid, continued to give credit to the bankrupts to the time of their bankruptcy, which took place on the 20th December, 1832, at which time he was a creditor for the sum of £1,927 4s. 6d. The only other facts stated in the special case, material to the present question, is, that by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit of the title deeds, or by the written memorandum. The question is, whether Pollard is, under the circumstances, entitled to have his debt paid out of that part of the estate of the bankrupts which consists of their property in Scotland, in preference to their general creditors; or, in other words, the assignees being liable to all the equities to which the bankrupt was subject, whether such a deposit and agreement, made and entered into in this country, gave to the creditor such a title as against his debtor to have the agreement performed and the debt paid out of the property in Scotland, the subject of such deposit and agreement. The special case also finds that the deposit and agreement does not by the law of Scotland create any lien or equitable mortgage upon the estate. By this statement of the law of Scotland, which, sitting here, I must consider

<sup>1</sup> The opinion only is given. — ED.

as a fact, I am bound, but so far only as the statement goes, and that does not find anything contrary to the well-known rule, that obligations to convey, perfected *secundum legem domicilii*, are binding in Scotland, but that by the law of Scotland no lien or equitable mortgage was created by the deposit and agreement; by which must be understood that the law of Scotland does not permit such deposit and agreement to operate *in rem*, and not that they may not give a title to relief *in personam*. It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the courts of equity to operate *in rem*: but in contracts respecting lands in countries not within the jurisdiction of these courts they can only be enforced by proceedings *in personam*, which courts of equity here are constantly in the habit of doing: not thereby in any respect interfering with the *lex loci rei sitæ*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

The observations of Lord Hardwicke in *Penn v. Baltimore*, 1 Ves. 454, are founded upon this distinction. In *Lord Cranstown v. Johnston*, 3 Ves. 182, Lord Alvanley, upon principles of equity familiar in this country, set aside a sale in the Island of St. Christopher, by the laws of which country the sale was perfectly good, no such principles of equity being recognized by the courts there, saying, "With regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situated in England." In *Scott v. Nesbitt*, 14 Ves. 442, Lord Eldon, in the face of the master's report finding that there was no law or usage in Jamaica for a lien by a consignee in respect of supplies furnished to the estate, directed consignees to be allowed such expenditure in their account with encumbrancers. Bills for specific performance of contracts for the sale of lands, or respecting mortgages of estates, in the colonies and elsewhere out of the jurisdiction of this court, are of familiar occurrence. Why then, consistently with these principles and these authorities, should the fact, that by the law of Scotland no lien or equitable mortgage was created by the deposit and memorandum in this case, prevent the courts of this country from giving such effect to the transactions between the parties as it would have given if the land had been in England? If the contract had been to sell the lands a specific performance would have been decreed; and why is all relief to be

refused because the contract is to sell, subject to a condition for redemption? The substance of the agreement is to charge the debt upon the estates, and to do and perfect all such acts as may be necessary for the purpose; and if the court would decree specific performance of this contract, and the completion of the security according to the forms of law in Scotland, it will give effect to this equity by paying out of the proceeds of the estate (which being part of the bankrupt's estate must be sold) what is found to be the amount of the debt so agreed to be charged upon it, which is what the creditor asks. The special case finds, that the deeds were deposited and the agreement signed by the bankrupts in order to induce the creditor to give them further credit, and that he, relying upon the security of the hereditaments so charged to him, continued to give credit to the bankrupts to the time of their bankruptcy. The transaction is in no respect impeached, and there is no competition with any person having obtained a title under the law of Scotland. The only parties resisting the creditor's claim are the assignees, who are bound by all the equities which affected the bankrupts. To deny to the creditor the benefit of this security would be an injustice which, if unavoidable, would be much to be regretted. In giving effect to it I act upon the well-known rules of equity in this country, and do not violate or interfere with any law or rule of property in Scotland, as I only order that to be done which the parties may by that law lawfully perform.

I reverse the judgment of the Court of Review, giving to the creditor payment of his debt out of the proceeds of the estate.

*Judgment of the Court of Review reversed.*

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### ACKER v. PRIEST.

SUPREME COURT OF IOWA. 1894.

[*Reported 92 Iowa, 610.*]

DEEMER, J.<sup>1</sup> The plaintiffs in the equity suit are the heirs at law of Elizabeth Priest, deceased, and the defendant, Stephen C. Priest, is their father. Mrs. Priest was a daughter of one Joseph Abrams. Joseph Abrams had one son and three daughters, besides Mrs. Priest. In the month of July, 1884, Abrams, who was then living in the State of Kansas, concluded to make a partial distribution and advancement of his property to his children. He was then the owner of two farms in Kansas, one of which was known as his "Home Farm," and the other was occupied by defendant Priest and his family. Thomas W. King, another son-in-law, owned and occupied another and a third farm in the same county as the other two. In order to carry out his purpose, and make an equal distribution of property to his daughters, Abrams

<sup>1</sup> Part of the opinion only is given. — Ed.

made arrangements with King to exchange the home farm, valued at \$8,000, for the King place, at the agreed price of \$4,000. Prior thereto, however, Abrams had had a conversation with defendant Priest, in which he told him he intended to give him a farm. After making arrangements with King, Abrams informed defendant that he had an opportunity to trade the home farm for King's land, and directed defendant to go and look at the farm, and if it suited him he (Abrams) would make the exchange. Defendant, after examining the place, was pleased with it, and so informed Abrams, and Abrams made the contemplated exchange. Abrams deeded the home farm to King, and King, by direction of Abrams, and with the knowledge, direction, and consent of the deceased, Mrs. Priest, made a deed to his place to the defendant Priest. This last deed was a warranty deed, in the usual form, and for the expressed consideration of \$4,000. Shortly after the making of these deeds, the defendant moved onto the King farm, and used and occupied it for a year or more, when he sold it, and with the proceeds purchased a farm in Cass County, Iowa, from one Isabella Goodale. The deed to the Cass County land was taken in the name of the defendant with the knowledge and consent of his wife. Defendant and his wife immediately took possession of the Cass County land, and occupied and used the same until the death of his wife, in April, 1888. After the death of the wife, and in May, 1891, the defendant sold the land in Cass County, and at the time of the commencement of this suit was in possession of a large part of the proceeds of the sale. Plaintiffs claim that the defendant at all times had the title to the Kansas land and to the land in Cass County in trust for his wife, Elizabeth V. Priest, and that they, as her heirs at law, are entitled to have a trust impressed upon the funds now in the hands of the defendant, arising out of the sale of the Cass County land. Defendant Isaac Dickerson was made a party to the suit because of his having possession of some of the funds arising from the sale of the land in this State. . . .

Plaintiffs do not — nor, indeed, could they, under the statutes of either Kansas or of this State — claim an express trust in the land, or the proceeds thereof. Their claim is that from the transactions between the parties, as proved, there arose an implied, a resulting, or a constructive trust, which the law will recognize and enforce. We turn then to the evidence, and find that while it was the intention of Abrams to make a partial distribution of his estate among his heirs, yet it did not appear to him to be important to whom he made the deeds, — whether to his daughters, in their own names, or to their husbands. The deed to the home farm was made to King, the husband of one of his daughters, and the deed to the King farm was made direct to defendant Priest. Abrams had previously spoken to defendant about giving him a farm, and while the deed was, no doubt, made so as to place all his children on an equality, it is quite evident to us that it was wholly immaterial to him to whom the deed should be made. Before having the deed made to defendant, Abrams spoke to his daughter, Mrs.

Priest, about how the deed should be made, and "she said to make it to her husband; it was all the same." Again, Abrams testifies, "My daughter gave no reason [for making the deed to her husband], except that it would be all right, recognizing him as her husband." Even if Abrams intended the deed to be for the benefit of Mrs. Priest and her children, as he says, he did not so state to defendant, and defendant had no knowledge but that he was to take the beneficial as well as the legal estate. Abrams directed King to make the deed to defendant, and King had no conversation whatever with defendant.

Applying these facts to the statutes of Kansas, before quoted, with reference to the creation of trusts,<sup>1</sup> and it is clear that defendant took an absolute title to the land deeded him by King, unincumbered with any trust. It is contended, however, that the laws of Kansas have no application to this case, that the statutes above quoted relate simply to the remedy, and that the *lex fori* governs. Without deciding this question, so far as it relates to the statute of frauds, for it is not necessary to a determination of the case, and passing it with the single remark that where the statute relates simply to the remedy, and does not make the parol contract void, as is the case with the statute in question, there is much force in appellants' position, we are clearly of the opinion, however, that the other statutes with reference to the creation of trust estates are binding, for they go to the validity and operation of the contract, and of the alleged trust in the land. It is familiar doctrine that the law of the place where the contract is made is to govern as to its nature, validity, obligation, and interpretation, and the law of the forum as to the remedy. *Bank v. Donnelly*, 8 Pet. 316; *Scudder v. Bank*, 91 U. S. 406; *Burchard v. Dunbar*, 82 Ill. 450. It is also everywhere acknowledged that the title and disposition of real property are exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. *Kerr v. Moon*, 9 Wheat. 565; *McCormick v. Sullivan*, 10 Wheat. 196. And a title or right in or to real estate can be acquired, enforced, or lost only according to the law of the place where such property is situated. *Bentley v. Whittemore*, 18 N. J. Eq. 373; *Hosford v. Nichols*, 1 Paige, 220; *Williams v. Maus*, 6 Watts, 278; *Wills v. Cowper*, 2 Ohio, 124.

If we are correct in our premises, it necessarily follows, as a conclusion, that under the laws of Kansas there was no trust created by law in the Kansas land, even if it be said that Mrs. Priest furnished the consideration paid for the land, because there was no agreement on the part of the defendant that he should hold the title in trust for his wife.<sup>2</sup>

<sup>1</sup> Gen. St. Kan. 1868, c. 114, § 6. When a conveyance for a valuable consideration is made to one person, and the consideration thereof paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject to the provisions of the next two sections. — Ed.

<sup>2</sup> The court further held that apart from the statutes of Kansas there was no trust. *Acc. Depas v. Mayo*, 11 Mo. 314; *Penfield v. Tower*, 1 N. D. 216. — Ed.

## PURDOM v. PAVEY.

SUPREME COURT OF CANADA. 1896.

[Reported 26 Canada, 412.]

THIS action was brought by Pavey & Co., creditors of one Ebenezer Davidson. The said Davidson had made a general assignment for the benefit of his creditors; the assets were insufficient to pay the debts, and a balance was due these plaintiffs. Afterwards Davidson became entitled to land in Oregon; he conveyed this land to his father, who gave to Purdom a mortgage on the land equal to the amount of the purchase-money named in the deed. The plaintiffs alleged that Purdom took said mortgage as a trustee for Davidson, in pursuance of a fraudulent scheme to defraud plaintiffs and other creditors of Davidson; and prayed that Purdom should be declared a trustee for Davidson, and that the money due on the mortgage note should be ordered paid into court for the benefit of the plaintiffs. The defendants demurred. From a judgment of the Court of Appeal of the Province of Ontario, overruling the demurrer, the defendants appealed to this court.<sup>1</sup>

STRONG, C. J. So far as the lands are concerned, the validity or invalidity of this transaction must depend on the *lex rei sitæ*, — the law of the State of Oregon, — and there is no allegation that according to that law a constructive trust by operation of law would arise by reason of the intent to hinder and delay creditors, or that even an express trust must necessarily enure to the benefit of or be available for the satisfaction of creditors. . . .

Then whether the allegation of a "trust" of the purchase-money secured by the mortgage which the plaintiffs allege is to be considered as an averment of a trust arising by operation of law consequent upon the illegality of the transaction or as an allegation of a conventional express trust, in either case the question would depend on the *lex rei sitæ*, and from this alone it follows that the forum of the situs is the proper forum.

In this last aspect of the case, *Re Hawthorne*, *Graham v. Massey*, 23 Ch. Div. 743, and *Norris v. Chambres*, 29 Beav. 246, appear to me to be authorities.

*Appeal allowed with costs.*

<sup>1</sup> This short statement is substituted for that of the Reporter. Part of the opinion only is given. — ED.

## SIEBBERAS v. DE GERONINO.

COURT OF CASSATION, PALERMO. 1894.

[*Reported Journal du Palais*, 1895, IV. 28.]

THE COURT. The Court of Appeal regards as nullified the trust for the Italian family Siebberas of property in Great Britain, by virtue of the repealing law of 1818, of Article 889 of the Italian Civil Code, and of Article 24 of the Temporary Law of November 30, 1865. It permits the application of the Italian law to this property. Its judgment is clearly erroneous. Every sovereignty which exists in the great family of nations is essentially autonomous and independent, and the right of each is limited by the equal right of the others. This sovereignty is shown, first, in dealings between citizens who are subject to the same sovereign. It is shown in a second aspect in dealings with citizens who are subject to another sovereign; under this second aspect science considers every sovereignty as an international person capable of rights and duties. There is no doubt but that by reason of its autonomy every sovereignty considered under the first aspect governs for itself its organization, its administration, and the provisions intended to protect the interests of the people and of the country; laws being only the expression of the conscience of the people and of the needs of the nation, and requiring to be in conformity with the customs, the traditions, the degree of civilization, and the racial, physical, and moral constitution of the people. On the other hand, laws should be the necessary and progressive development of the civilization and needs of the people, in order to be found in accordance with them and to grow with their development. It follows that laws, because of the reasons which have led to their adoption, can have effect only in the territory ruled by the sovereign which has promulgated them.

These principles, sound as they are for laws in general, are particularly so for those which concern the internal public law and the social organization, among which we must place those which authorize or forbid the creation of trusts. They are essentially territorial in character, and have to do only with citizens who are within the territory of the sovereign and with property situated within the same territory. The Court of Appeal, therefore, was wrong in holding that trusts established over property in a foreign country are null for the sole reason that the defendant is an Italian citizen. The Italian law has dissolved trusts, entails, and other settlements in perpetuity established according to previous law; but only those which existed within the kingdom, and not those which, established in another territory, are subject to another autonomous and independent sovereign. It is even more false to suppose, as the court appears to have done, and as the defendants in error continually do, that the trusts in this case should be considered subjectively null by reason of the provisions of our law, and as objectively



valid because at Malta, where the property is situated, they are authorized. A right cannot be at once valid and null; and if an Italian court attributed to Italians the absolute title in property, and yet held the property subject to a trust in the country where it is situated, what could be the effect of such a decision? It could not be executed in the country of situs, and would consequently be a mere academic opinion, deprived of juridical and practical value.

These principles are not opposed to Article 8 of the preliminary provisions of the Italian Civil Code; the judgment appealed from violates the letter and spirit of it. This article concerns itself with the Italian sovereignty considered as an international person; it is face to face with the ancient doctrine, according to which foreigners did not participate in the benefit of the law and were considered enemies: *adversus hostem aeterna auctoritas esto*. This system had been limited by the principles of reciprocity and common utility; but these limitations no longer correspond to the progress of jurisprudence, and the principle was finally adopted that a private right belongs to the individual as an individual. The Italian sovereignty, as a result, not only admits foreigners to the enjoyment of such civil rights as belong to citizens, but even goes so far as to permit them to invoke the law of their own country to settle successions; the statute personal had previously regulated only the succession to movables, and the succession to immovables was regulated by the statute real. The Italian law has come to look upon succession as an emanation of the family, as an *universitas juris*, continuing the person of the deceased. This provision shows that the Italian legislature has intended to follow the progress of private international law; and has considered that, according to the *jus gentium*, it is not contrary to the exercise of an autonomous and independent sovereignty to admit within a territory the application of a foreign law, if this application is based upon an international duty, a reason of comity, and the mutual utility of nations. It is to be noted that this bold but eminently liberal principle is applicable only to foreigners. Italian citizens are subject to it neither as to their property situated in Italy, which is governed by the provisions of the Civil Code in relation to successions, nor as to their property situated abroad, because the Italian sovereignty cannot impose its authority upon another autonomous and independent sovereignty which is bound to enforce its own laws. So much is clear, however principle and authority may differ about the sense of Article 8. We must also remember that a literal interpretation is illogical; a provision should be interpreted according to its spirit, and Article 8 never meant to provide for imposing its application upon foreign sovereignties.

It follows that trusts established in a foreign country are valid, even if they are for the benefit of Italian citizens, if they are authorized by the law of their situs. The Italian law did not mean to extend the scope of a mere legislative provision so as to cover any principle of international law; it has conformed to the progress of international law

on the subject of the jurisdiction of foreign law, and has admitted this jurisdiction in all cases where it seemed necessary because of the nature of the rights in question ; it has shown itself generous and liberal, in order to give a laudable example, and to invite foreign sovereignties to adopt the same rule.

Finally, in spite of the development of international law, it is not the duty of a sovereignty to abdicate its inherent right to the preservation of its constitution, to its independence, to the maintenance of public order, and to all that *ad statum rei publicæ spectat* ; so that in every case the application of a foreign law should yield, if it would have the result of derogating from the public laws of the kingdom, and from those which concern public order and public morals. Now the abolition of trusts in Italy is due either to political reasons or to the economic principle that the conveyance of property should be free in the interest of the development of the general wealth of the nation ; so that the abolition of trusts is due to motives of public order. The English law, which authorizes trusts, would therefore have no effect upon immovables situated in Italian territory. But reciprocally the Italian law cannot have the effect of invalidating trusts created in England, even though the trust estate belongs to Italian citizens, and though succession is an indivisible unit.

*Judgment of the Court of Appeal quashed.*

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## FOWLER'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1889.

[Reported 125 *Pennsylvania*, 388.]

PAXSON, C. J.<sup>1</sup> By the terms of this deed of trust the trustee is required to "pay over the income and dividends on said bonds to Marie Washburne Fowler (appellant). . . . And should the said Marie Washburne Fowler die, the said trust herein declared shall inure to the benefit of her heirs ; but if she have no children the same shall revert to my estate." There was a further direction to add fifty dollars per year out of the income to the principal. It also appeared that since the execution of this paper the said Marie has given birth to a child, who is now living, and that the settler or donor, Elihu B. Washburne, died without having in any manner exercised the power of revocation reserved in the deed of trust. The question is whether the said Marie W. Fowler is entitled to the corpus of the trust estate, consisting only of corporation bonds, freed and discharged from the trust. The court below decided that she was not, and in this we see no error. . . .

Nor do we think the direction to accumulate is invalid under the act

<sup>1</sup> Part of the opinion only is given. — ED.

of 1853.<sup>1</sup> The act does not apply. The settler was a citizen of Illinois and died there; the deed of trust was made there; the securities are those of foreign corporations, and Mrs. Fowler is a citizen of Colorado. I do not understand it to be denied that the trust is valid by the law of the State where it was made and of the State where it is enjoyed; and the mere fact that the trustee happens to be a Pennsylvania corporation cannot invalidate the trust. The act of 1853 was only intended to apply to our own citizens, and a trust intended to take effect beyond our own territory cannot be affected by it. Authorities upon this point are not abundant; at least they have been sparingly cited. We may refer, however, to Attorney-General *v. Stewart*, 2 Mer. 161; *Curtis v. Hutton*, 14 Ves. 537; *Hill on Trustees*, 457; *Draper v. College*, 57 How. Pr. 269; *Chamberlain v. Chamberlain*, 43 N. Y. 433; *Crum v. Bliss*, 47 Conn. 592. The case is clear upon principle.

*The decree is affirmed, and the appeal dismissed at the costs of the appellants.*

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## FIRST NATIONAL BANK v. NATIONAL BROADWAY BANK.

COURT OF APPEALS, NEW YORK. 1898.

[Reported 156 New York, 459.]

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 26, 1897, affirming a judgment in favor of the defendants, entered upon a decision of the court on trial at Special Term dismissing the complaint upon the merits.

The plaintiff commenced this action to compel the Broadway Bank to transfer to its name certain shares of capital stock, issued to and standing in the name of "Philo P. Hotchkiss, trustee." The defendant bank denied the plaintiff's ownership, and set up the claim of title made thereto by Seth M. Tuttle, as alleged trustee of the shares, in succession to Hotchkiss. Tuttle was subsequently brought into the action and made a party defendant, upon his application, in order to prosecute his claim of ownership.

The general history of the trust is, that in 1857 William H. Inlay, of Hartford, Connecticut, deeded certain Michigan lands to Chester Adams, of the same place, as trustee. By the terms of the trust he was

<sup>1</sup> Act of April 18, 1853, Pa. P. L. 563. "No person or persons shall, after the passing of this act, by any deed, will, or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interest, or profits thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler, or testator." — Ed.

to sell the lands and to invest the net proceeds in good bank stocks in his own name as trustee, with power to sell such stocks and to reinvest in other bank stocks. He was to pay the net income equally to Imlay's three unmarried daughters, for their sole and separate use, etc. The issue of any daughter was to take in fee the share held in trust for the mother, upon her death, and upon the death of one or more of the daughters, without issue surviving, the trust share or shares were to vest in the survivors or survivor. Adams, the trustee, died subsequently, leaving a will, wherein he appointed one Bartholomew as his successor in the trust, pursuant to a power to that effect contained in the trust deed. Subsequently, Bartholomew resigned as trustee, and Hotchkiss was, by an order of the Probate Court of Hartford, Connecticut, appointed trustee in succession. At the time of his appointment, Alice, one of Imlay's daughters, had died, without issue, and her one third share in the trust had vested in her two surviving sisters, Isabel and Georgiana. Isabel had also died, but left issue surviving, to whom her portion of the trust estate was paid. Georgiana married Hotchkiss and has two daughters. When Hotchkiss was substituted as trustee, under the deed of trust, the defendant Broadway Bank transferred the stock in question into his name, upon receiving the order mentioned, which referred to the trust deed. Some time after his appointment, Hotchkiss, who held himself out as manager of "Hotchkiss & Co.," presented a note for \$12,000 of that firm; which the plaintiff discounted upon the pledge of collateral securities, which included the stock in question and which were taken up, by means of the proceeds of the discounted note, from the Home Insurance Company, by which company the collaterals had been held to secure a former note of Hotchkiss & Co. The plaintiff received at the time a writing signed by Georgiana Hotchkiss, which authorized her husband to borrow on the "stocks standing in his name as trustee for my benefit and owned by me." Subsequently, upon default in payment of the note, the plaintiff, pursuant to the terms of the stock note discounted by it, sold the stocks at public auction and purchased them thereat. Upon requesting of the defendant bank a transfer of the stock and the issuance of a new certificate, the request was refused, and thereupon this action was instituted. Hotchkiss, having been convicted of grand larceny and sent to prison, was removed as trustee upon the application of Alice Richards, a daughter of Georgiana Hotchkiss, the beneficiary of the deed of trust, and Tuttle was appointed trustee in his stead by an order of the Supreme Court in this State. The concern of Hotchkiss & Co., whose note was discounted by the plaintiff, appears to have consisted only of Georgiana I. Hotchkiss, the business being managed by Philo P. Hotchkiss.<sup>1</sup>

GRAY, J. Upon these facts, which are undisputed, the courts below have held that Tuttle was entitled to the possession and transfer of the stock and to the accrued dividends thereon. The conclusion as to the title to the property was reached upon the theory that, as the plaintiff

<sup>1</sup> Arguments of counsel and part of the opinion are omitted. — Ed.

received the stock with constructive notice that it was the subject of a trust, no title was acquired thereto which it could enforce ; for the pledge was contrary to the terms of the trust. I think that, so far, we should agree in the decision of the learned justices below. . . .

But I do not think we should affirm the judgment below, in so far as it denies the plaintiff's claim upon the life interest of Georgiana Hotchkiss in the dividends accumulated and to be declared upon the stock. The learned justices below have denied the claim upon the ground that her interest, as beneficiary of the trust, was inalienable under the Revised Statutes, 1 R. S. 729, § 63. That would be perfectly true, if the trust could be regarded as governed by the laws of this State ; but I am unable to so regard it. The trust was created in Connecticut, by a resident of that State, in favor of his children there. Adams, the trustee named in the deed of trust, was domiciled in Connecticut, and by his will, probated there, he appointed his successor in the trust as directed by the deed. Hotchkiss was appointed trustee, in further succession, by an order of a court of that State. The transaction of loan by the plaintiff, itself, was in New Jersey. Under these circumstances, I do not see how the questions relating to the interests of the beneficiary in the trust are to be dealt with according to the provisions of our statutes. What the law of the State of Connecticut may be concerning them, as affected by any legislative enactments, we are not informed by the proofs in the case. Section 63 of our Revised Statutes, 1 R. S. 730, effected a change in the common-law rule, which permitted the alienation of their interests by *cestuis que trustent*, and, in the absence of proof upon the subject, we may not indulge in the presumption that the prohibitory provisions of our statutes have been enacted in Connecticut. *Leonard v. Navigation Co.*, 84 N. Y. 48 ; *Vanderpoel v. Gorman*, 140 N. Y. 563. It is to be presumed that the common-law rules, in equity, still obtain there. Under the common law, a wife had complete capacity to dispose of her separate estate, and, if she was the beneficiary of a trust, she was capable of charging her equitable interest, to the extent that it was not inconsistent with the terms of the trust instrument. *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34-37 ; *Yale v. Dederer*, 18 N. Y. 265 ; *Dyett v. Trust Co.*, 140 N. Y. 54-65. By this deed of trust, the settlor's only apparent intention, as to his daughters' enjoyment and disposition of their interests, is that they should have the sole and separate use, free from their husbands' control or interference. When the plaintiff made the loan of money upon the note of Hotchkiss & Co., it was upon a written authorization of Georgiana Hotchkiss to her husband that he might "borrow" on certain named stocks "standing in his name as trustee for my benefit and owned by me." She was the person dealing under the firm name of Hotchkiss & Co., and had filed her certificate to that effect, as required by the laws of the State. Thus, we have a transaction entered into by the plaintiff, presumably, in reliance upon the representations of Georgiana, the beneficiary, and for the benefit of a business concern, which was legally hers. I think she is estopped by

her acts from setting up any claim to the income upon the stock, received and which may be hereafter, during her life, received by way of dividends, by the trustee. If this were not so, then the court would be aiding her in the perpetration of a fraud upon the plaintiff. That the writing signed by her, and upon which the plaintiff's officers acted in dealing with Hotchkiss, was a disposition, or pledge, by his wife and beneficiary, of her separate interest in the trust, I entertain no doubt, and to hold otherwise would be highly inequitable. I am not without some hesitation upon this phase of the case; because I am mindful of the policy of the State, as declared in the enactment of a statutory provision, so beneficent and protective in its character as section 63; but I cannot regard this case as one which comes within the sphere of any State policy. I look upon the question as simply one of a trust created in, and governed by the laws of, a foreign State, as presumed, if not proved, and nothing appears to prevent our giving effect to the act of Georgiana Hotchkiss, the beneficiary, in disposing as she did of her interest. The conclusion I reach, therefore, is that this judgment should be modified, so that it shall adjudge that the dividends upon the stock in question, accumulated and to be declared, shall be paid to the plaintiff, during the lifetime of Georgiana I. Hotchkiss, and, as so modified, the judgment should be affirmed, without costs of this appeal to any party, save to the defendant Broadway Bank, to be paid out of the fund.

O'BRIEN, BARTLETT, and HAIGHT, JJ., concur; PARKER, C. J., MARTIN, and VANN, JJ., dissent.

*Judgment modified.*<sup>1</sup>

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## SECTION V.

### MARITAL PROPERTY.

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## DE NICOLS *v.* CURLIER.

HOUSE OF LORDS. 1899.

[*Reported* [1900] *Appeal Cases*, 21.]

EARL OF HALSBURY, L. C. My Lords, it is not necessary to state with great minuteness how the question in the present appeal arises. It is enough to say that two French subjects were married according to the laws of France on May 30, 1854. No marriage contract or instrument in writing was executed by either of the parties. The parties lived together, and in the year 1863 they came to England, and in the

<sup>1</sup> *Acc. Riddle v. Hudgins*, 58 Fed. 490. — Ed.

year 1865 the husband obtained the status of a naturalized British subject.

The whole dispute turns on the question whether the changed domicile and naturalization of the husband affected the wife's rights so as to give the husband the power to dispose of all the movable property by will instead of being restricted to the power of disposing of only one-half of it, as he undoubtedly would have been so restricted by the French law if the French law is decisive of the question.<sup>1</sup>

If this is the law by which the matter is to be governed, it cannot be denied that the appellant here must succeed, and it is a little difficult to understand upon what principle contracts and obligations already existing *inter se* should be affected by an act of one of the contracting parties over which the other party to the contract has no control whatever. And indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, in that case the change of domicile could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife; when if the law creates that contract relation, then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction.

A written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the married status. I not only do not understand, but I should decline to assent to any such view, unless I am compelled by authoritative decision or statute to adopt a view which to my mind is so entirely unreasonable. And it does not appear to me that any court before whom this question has come would disagree with me as to its being unreasonable.

The Master of the Rolls himself says: "It is not altogether satisfactory to hold that a change of domicile cannot affect an express contract embodying the law of the matrimonial domicile, but that a change of domicile does affect the application of that law if not embodied in an express contract."

My Lords, I should think that, in order to be binding on your Lordships, a previous decision must be in principle, and, as applicable to the same circumstances, identical; and it appears to me that the case by which the Master of the Rolls thought himself bound (*Lashley v. Hog*, 4 Paton, 581) is quite distinguishable both in principle and in circumstances.

To omit other questions, the cardinal distinction between the French and the Scottish law is not, I think, without an important bearing upon

<sup>1</sup> The Lord Chancellor here stated the French law. — Ed.

the very question in debate, and I think it may be stated shortly thus : If the wife by the marriage in Scotland acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his; and herein, I think, is to be found the key to Lord Eldon's judgment. He says (4 Paton, 617) : "The true point seems to be this, whether there is anything irrational in saying that as the husband, during the whole of his life, has the absolute disposition over the property, that as to him, whom the policy of the law has given the direction of the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions and property which is his own, and which is to remain his own, or to become that of his family according to his will — why should it be thought an unreasonable thing, that, where there is no express contract, the implied contract shall be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy in case the husband thinks proper to die intestate?"

It will be observed that the whole point of what Lord Eldon argues is that the whole of the property, apart from express contract, is absolutely and entirely the husband's, and that as by law he can dispose of it as he will, it is not unreasonable that he should be at liberty to do something which by its legal effect will change what I think are inaccurately described as the rights of the wife, but are accurately described as what would have been the rights of the wife if no change had taken place, because in substance she has until the husband's death no rights at all.

Doubtless it is true that, according to the authorities on Scottish law, the right of the wife is no right at all in its strict sense. When speaking of the *jus mariti* it is described as a legal assignation to the husband, and in commenting on this authority, the late Mr. Fraser, while at the Scottish Bar, in his book on the Law of Husband and Wife, 2d ed. vol. i. p. 677, says: "At a very early period of our law, the distinction between the two rights was recognized. The right of administration was regarded as being nothing more than its name imports — a right of administering the property of the spouses; while the *jus mariti* was something separate and superior, its purpose being to transfer the property from one spouse to the other. The distinction is settled and taken in a number of cases ranging from an early period to the present time, and has not been so clearly marked in some institutional works, solely from the desire of the writers to reconcile it with the notion of an absolute veritable *communio*." . . . "The distinction is thus stated in argument in the Session Papers of Gowan *v.* Pursell:



The *jus mariti* over the movables is a right during the existence of the marriage of absolute property. The husband may sell, or squander, or wastefully destroy the movables that fall under communion.' How different the position of the wife is under the French law is sufficiently indicated, in contrast to the above extract, by section 1443 of Code Civil, which enacts that: "1443. A separation of property can only be judicially sued for by the wife whose dowry is in danger, and when the disorder of the husband's affairs is such that there is reason to fear that his property will not be sufficient to satisfy the wife's rights and claims. Any voluntary separation is void." And if the propositions are put shortly — that the wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right — the distinction between the two systems is evident enough. The *communio bonorum* in Scotland is a mere fiction. In France it is a reality, and in England, as the Master of the Rolls says, the parties to the litigation now being discussed, Mr. and Mrs. Hog, were both English, married in England, where her unsettled property, existing and after acquired, became the property of Mr. Hog by the mere fact of the marriage, and gave Mrs. Hog no proprietary right whatever to the movable property in question.

Once it is admitted that the marriage gives a proprietary right (and therein is the importance of the distinction Lord Eldon took between what was inaccurately argued in that case as a proprietary right conferred by the fact of marriage and a real proprietary right conferred by specific contract), the anomaly pointed out by the Master of the Rolls and sought to be explained becomes at once intelligible. It is only material as illustrating what was the prevailing train of thought in the minds of Lord Eldon and Lord Rosslyn. Both of them speak of the words "implied contract," by which I presume they mean implied from the relation of husband and wife, and not unnaturally they deduce the conclusion that if it is implied from that relation only the husband's change of domicile may bring with it the consequential change from such relation.

Here, however, as I have endeavored to point out, the French marriage confers not only an implied but an actual binding partnership proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify.

I can only account for the absolutely inaccurate use of the Scottish term *jus relicte* as arising from a reference to a dispute that appears to have existed in the Scottish authors as to whether those rights flowed from the communion, whereas, to quote again from Mr. Fraser's book, p. 671, where he says: "It has been found in accordance with the opinions of the French commentators, of Dirleton, and other lawyers of our own country, that the *jus relicte* and *legitim* are in all respects the same; that they are mere casual contingent rights during the subsistence of the marriage, existing then only in hope, and coming

into proper rights merely at its dissolution; that they are not rights of division of a fund already held in common, but rights of debt against the husband's executors, constituting the widow and the children creditors, whose right comes into being by the husband's death, and secondary creditors too, for all other debts must be paid before theirs."

It is, therefore, as I understand, that when once Lord Eldon came to the conclusion that the husband and wife had become Scottish domiciled spouses, the property not affected by a previous complete and irrevocable right would properly be distributed according to Scottish law.

It follows, therefore, if I am right, that that case is not binding on your Lordships, and that we are at liberty to decide the question now in dispute, in accordance with reason and common sense.

I therefore move your Lordships that the order appealed from be reversed, and that in respect of costs, as I understand this is only one question in the summons which comprehends other questions also in debate, the costs of this appeal should be costs in the summons.

LORD MACNAGHTEN. My Lords, in 1854 Mr. De Nicols, the testator, and the appellant, who is now his widow, intermarried in Paris. They were both French by birth and both domiciled at the time in France. They married without a contract of marriage, and consequently under the law of France they became subject to the system of community of goods.

In 1863 Mr. and Mrs. De Nicols left Paris and came to London. They acquired an English domicile, and in 1865 Mr. De Nicols obtained a certificate of naturalization in this country. From that time forward their residence in England was continuous. Mr. De Nicols became a restaurant proprietor in London. He was successful in business, and amassed a large fortune, consisting of both movable and immovable property.

Mr. De Nicols died in February, 1897, having made a will in the English form and language.

The question for your Lordships' consideration is whether Mr. and Mrs. De Nicols continued subject to the system of community of goods after they became domiciled in England. On the one hand it is contended that the change of domicile from French to English destroyed the community altogether, and, therefore, that the testator's will operated upon the whole of the property vested in him which, but for that change, would have been common. On the other hand it is said that the community continued notwithstanding the change of domicile, and that Mr. De Nicols remained bound by the article of the Code Civil, which provides that the testamentary donation by the husband cannot exceed his share of the community.

If the case were not embarrassed by the judgment of this House in *Lashley v. Hog*, which was discussed so fully at the bar, it would not, I think, present much difficulty.

Putting aside *Lashley v. Hog* for the moment, the only question would seem to be what was the effect according to French law of the

marriage of Mr. and Mrs. De Nicols without a marriage contract? Upon that point there cannot, I think, be any room for doubt. It is proved by the evidence of M. Lax, the expert in French law called on behalf of the appellant, that, according to the law of France, a husband and wife intermarrying without having entered into an antenuptial contract in writing are placed and stand by the sole fact of the marriage precisely in the same position in all respects as if previously to their marriage they had in due form executed a written contract, and thereby adopted as special and express covenants all and every one of the provisions contained in articles 1401 to 1496 in Title V. of the Code Civil, headed "Of Marriage Contracts and the respective rights of spouses."

In support of this conclusion, M. Lax refers to the relevant articles of the Code and to a decision of the highest authority pronounced by the Cour de Cassation in January, 1854. The case as reported by Sirey presents the argument so clearly and so concisely that I may be pardoned for referring to it more in detail. The summary in Sirey's Reports is as follows: (*Tables Générales Contrat de Mariage*] paragraphe 8.) "The conjugal association as to property once formed at the time of the marriage by the operation of the law of the domicile or nationality of the husband cannot be altered later on either by a change of nationality or by the acquisition of a new personal domicile subsequently to the marriage." The case was this: An Englishman and an Englishwoman, a Mr. and Mrs. Boyer, were married in England without any settlement. Afterwards they went to France and jointly acquired immovable property there. The husband became a French citizen. The wife died first. On her death duty was demanded and paid on one-half of the property as having devolved upon her children as her next of kin. An action was brought for the return of the duty. The tribunal of Lille ordered repayment, holding that "the matrimonial compact in respect of property is as immutable as the marriage itself, of which it is an accessory." The revenue authorities appealed. The Cour de Cassation affirmed the decision. They founded their judgment upon their view of English law, which seems right enough, and upon the following considerations: that "the rule of the marriage of the spouses Boyer has followed them to France when they went there to settle and there acquired property," and that "the said rule has the same force as if a formal contract had been entered into between the said spouses for the regulation of their fortune."

Although this reasoning may not seem quite in accordance with the opinion which Lord Eldon expressed in *Lashley v. Hog*, as to the effect of an English marriage without a settlement, it indicates, I think, the view which, according to French law, would be taken of the compact as to property constituted by a French marriage under the Code Civil without an antenuptial agreement.

The expert who was called on behalf of the executors does not attempt to contravene this conclusion of law. He endeavors to minimize its effect by treating it as a self-evident proposition — as in fact

being nothing more than what the Code declares. He adds, however, that in his opinion the effect of a change of domicile or nationality upon the community system was never considered by the framers of the Code. That may be so. But if there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicile. Why should the obligations of the marriage law, under which the parties contracted matrimony, equivalent according to the law of the country where the marriage was celebrated to an express contract, lose their force and effect when the parties become domiciled in another country? As M. Lax points out, change of domicile and naturalization in a foreign country are not among the events specified in the Code as having the effect of dissolving or determining the community. Let us suppose a case the converse of the present one. Suppose an Englishman and an Englishwoman, having married in England without a settlement, go to France and become domiciled there. Suppose that at the time of the acquisition of the French domicile the husband has £10,000 of his own. Why should his ownership of that sum be impaired or qualified because he settles in France? There is nothing to be found in French law, nothing in the Code Civil, to effect this alteration in his rights. Community of goods in France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And the community must commence from the day of the marriage. It cannot commence from any other time. It appears to me, therefore, that the proposition for which the executors contend cannot be supported on principle. That, I think, was the view of the Court of Appeal. But they considered that the judgment of Lord Eldon in *Lashley v. Hog*, compelled them to decide in favor of the executors.<sup>1</sup>

It appears to me that the case is not governed by the decision in *Lashley v. Hog*, and I think the appeal ought to be allowed.

LORD MORRIS, LORD SHAND, and LORD BRAMPTON concurred.<sup>2</sup>

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## DE NICOLS *v.* CURLIER.

CHANCERY. 1900.

[*Reported* [1900] 2 *Chancery*, 410.]

THE effect of the change of domicile with reference to the testator's movable goods only having been determined in the appeal to the House

<sup>1</sup> The learned Lord here stated and commented upon the case of *Lashley v. Hog*. — ED.

<sup>2</sup> The concurring opinions are omitted.

*Acc. Blatchford v. Blatchford*, 1 E. Dist. Ct. (Cape Colony), 365. — ED.

of Lords, the summons now came on for further hearing with reference to the testator's real and leasehold property.

KEKEWICH, J. Undoubtedly the House of Lords considered and determined merely the question whether the marriage contract affected movable goods notwithstanding the change of domicile, and all that was said must be read with reference to that question, as the only one to which attention was directed. Albeit so restricted, the decision proceeded on the broad principle that a contract operating by force of law in the absence of expression by the parties is as complete and as obligatory as a contract expressed, and must have effect given to it on the same footing. Unless, therefore, there is some inherent disability in some particular property to be bound by such a contract, it must equally be applied to and enforced against all falling within its scope, and this is according to the language of the Code and the evidence given in explanation of it. On the present occasion the court is asked to determine whether in enforcing the contract it is right to include freehold and leasehold estates in England — that is, what we term real estate and chattels real, as distinguished from personal estate other than chattels real which is covered by the decision of the House of Lords. Assuming that these freehold and leasehold estates are within the scope of the contract, it is impossible to avoid the conclusion, that they are affected by it, unless, to repeat what has been already said, there is a disability inherent in this species of property. There are, therefore, two questions for consideration — one of fact — namely, whether these estates are within the scope of the contract; the other of law, whether they can be affected by it. The first question depends on the evidence which was before the House of Lords, some further evidence given by affidavit and orally on the hearing of the present application, and additional evidence adduced under leave given after the hearing in consequence of a letter from one of the witnesses which was communicated to the court. This evidence was directed to the proper meaning of “immeubles” in the French Code. There is no difficulty about the meaning of the word as regards the character of property comprised in it. It means, broadly, the soil itself and that which is attached to the soil as distinguished from that which, being unattached, is therefore movable. As in our own system of law so in that of France, some things are, from their close connection with the land, treated as attached to it, and, therefore, immovable; but these exceptions do not impair the general description, and are of no importance here. The difficulty which arose was whether the term comprised immovables abroad — that is, beyond France. The words of the Code are, apparently, wide enough to cover all, wherever situate, and, if it could be treated as an English instrument which the court is competent to construe, it would be impossible to avoid the conclusion that this is its real meaning. But to arrive at a conclusion respecting the construction of the Code in this particular is beyond the competence of the court. It is a matter of fact with which the court can

only deal according to the testimony of those qualified to give it. Hence the oral and the additional evidence subsequently given, to which reference has already been made. That evidence has set the matter at rest, and removed all difficulty. It may be stated in general terms that, unless an exception is established in a particular case on the ground of public policy (and there is no suggestion of that here), the provisions of the Code as regards "immeubles" are of universal application — that is, apply equally to immovable property situate in France and to that situate in a foreign country.

Turning now to the question whether there is any objection in law to the contract operating according to the intention of the parties so as to bind the freehold and leasehold estates, one is at once confronted by the principle which distinguishes obligations respecting real estate from those which affect personal estate. That principle is well established, and is to be found stated in different language in many books. It will suffice to cite one. In Story on the Conflict of Laws, § 158, the learned author says this: —

"The result of this reasoning (and it certainly has very great force) would seem to be, that in the case of a marriage without any express nuptial contract, the *lex loci contractus* (assuming that it furnishes any just basis to imply a tacit contract) will govern as to all movable property, and as to all immovable property within that country, and as to property in other countries, it will govern movables, but not immovables, the former having no situs, and the latter being governed by the *lex rei sitæ*."

In the following section — 159 — he expounds this subject in a manner so apposite to the case in hand that it is worth while to quote it at length. It runs thus: —

"Perhaps the most simple and satisfactory exposition of the subject, or, at least, that which best harmonizes with the analogies of the common law, is, that in the case of a marriage where there is no special nuptial contract, and there has been no change of domicile, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property, wherever that is acquired, and wherever it may be situate; but real or immovable property ought to be left to be adjudged by the *lex rei sitæ*, as not within the reach of any extraterritorial law. Where there is any special nuptial contract between the parties, that will furnish a rule for the case, and as a matter of contract, ought to be carried into effect everywhere, under the general limitations and exceptions belonging to all other classes of contracts."

According to the decision of the House of Lords, there is here a special nuptial contract between the parties ascertained by reference to the Code, but not less precisely ascertained because it was not reduced into writing in connection with the particular marriage. It ought, therefore (to adopt the language just quoted), to be carried into effect everywhere, but under the limitations and exceptions belonging to all other

classes of contracts, one of which is, that as regards immovables, the *lex rei sitæ* must prevail. There is nothing in the common law of England to make the contract, which we have already seen to be definite, unenforceable respecting the freeholds and leaseholds in question, and if there be any obstacle, it must be found in some statutory provision. There is none but the Statute of Frauds, but that does raise a formidable objection. Reference was made in argument to both the 4th and 7th sections of the statute. I do not propose to consider which of them is the more applicable, because, without doubt, either one or the other prohibits the creation of equitable interests in land, such as sought to be established here, except by writing under the hand of the creator of the trust. Nevertheless, it is insisted that the statute has no application to the circumstances of this case, and that the agreement between the parties made in consideration of marriage is sufficiently obligatory notwithstanding the absence of any writing. That is the point I am called upon to determine. It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the Statute of Frauds will not avail. In such an action, therefore, the rights of the parties to the land, their respective interests in it, and their mutual obligations respecting it, may and must be determined and enforced notwithstanding there has been no compliance with the statutory provision. The authorities for this are not numerous, but they are conclusive — namely. *Forster v. Hale*, 3 Ves. 696, 5 Ves. 308, 4 R. R. 128; and *Dale v. Hamilton*, 5 Hare, 369. In the latter case *Wigram, V. C.*, applied this ruling to a case where the partnership was intended to deal exclusively with land. Lord Lindley in his work on Partnership, 6th ed. p. 89, says that the latter case goes a long way towards repealing the Statute of Frauds, and that it is difficult to reconcile it with sound principle or the more recent decision of *Caddick v. Skidmore* (1857), 2 De G. & J. 52. This is a strong adverse comment, but yet I am bound to treat the decision as sound, and I did so in *Gray v. Smith*, 43 Ch. D. 208. Whether it is competent for the Court of Appeal now to disturb the ruling above quoted, or whether being competent the court would be willing to do so, is not for me to say; but at any rate I must take the ruling to be established. It by no means follows that I ought to extend it, and it is fairly open to question whether the rule obtaining in contracts of partnership is properly applicable to a contract of marriage. In one sense, no doubt, that is also a contract of partnership; but no one would, I think, venture to rely on this, the ruling in the two cases referred to having reference to commercial partnerships with which the court was there exclusively concerned. Nevertheless, the reasoning of the Lord Chancellor in *Forster v. Hale* seems to me to show that he intended to lay down a general rule, which may be applied without extension to the case in hand. This, I think, was the view of *Wigram, V. C.*, in *Dale v. Hamilton*, and also, as it seems to me, of

Lord Lindley, who cites the passage from the Lord Chancellor's judgment in *Forster v. Hale*, which supports it. The Lord Chancellor held that the question whether there was a partnership or not must be tried as a fact, and if it were established by evidence that there was a partnership, then the premises necessary for the purposes of that partnership would by operation of law be held for the purposes of that partnership. It is established here by evidence that land acquired by either of the two parties to the contract would by force of the contract be held by him or her on certain terms described briefly by the phrase, "community of goods." Any lands subsequently acquired are an acquisition brought within, and are required to fulfil the purposes of the contract, and according to the Lord Chancellor's reasoning they are by operation of law held for those purposes. There may be error in this way of stating the case and applying the Lord Chancellor's ruling, but I am unable to discover it, and must, therefore, hold that the freehold and leasehold estates are as much subject to the community of goods as the movables which have been held subject to it by the decision of the House of Lords.<sup>1</sup>

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### SAUL v. HIS CREDITORS.

SUPREME COURT, LOUISIANA. 1827.

[*Reported 5 Martin, New Series, 569.*]

PORTER, J.<sup>2</sup> The tableau of distribution filed by the syndics of the insolvent was opposed in the court of the first instance; and the opposition being sustained, an appeal has been taken to this court, by the syndics, by the Bank of the United States, the Bank of Orleans, and the Bank of Louisiana.

The claims admitted by the judge *a quo*, and which are now contested here, are: 1st. That of the children of the insolvent, who claim as privileged creditors for the amount inherited by them from their deceased mother. . . .

From the facts admitted by the parties, which admission makes the statement on this appeal, it appears: That Saul and his wife intermarried in the State of Virginia, on the 6th of February, 1794, their domicile being then in that State; that they remained there until the year 1804, when they removed to the now State of Louisiana; that they fixed their residence here, and continued this residence up to the year 1819, when the wife died; that after their removal from Virginia, and while living and having their domicile in this State, a large quantity of property was acquired, which at the death of the wife remained in the possession of her husband, the insolvent.

<sup>1</sup> *Acc. Scheferling v. Huffman*, 4 Oh. S. 241 (*semble*). — ED.

<sup>2</sup> Parts of the opinion are omitted. — ED.



The children claim the one-half of the property, as acquests and gains, made by their father and mother in this State. The appellants contend, that as the marriage took place in the State of Virginia, by whose laws no community of acquests and gains was permitted, the whole of the property acquired here belonged to the husband.

This statement of the matter at issue shows, that the only question presented for our decision is one of law; but it is one which grows out of the conflict of laws of different States. Our former experience had taught us, that questions of this kind are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice. The argument of this case has shown us, that the vast mass of learning which the research of counsel has furnished, leaves the subject as much enveloped in obscurity and doubt as it would have appeared to our own understandings had we been called on to decide without the knowledge of what others had thought and written upon it. . . .

Recourse must be had to the former laws of the country.

The positive regulations of Spain on this subject are contained in two laws: one of the *Fuero Real*, and the other of the *Partidas*.

That part of the law of the *Partidas* which directly applies to the case before the court is in the following words: "E dezimos, que el pleyto que ellos pusieron entre si, deve valer en la manera que se avinieron ante que casassen. o quando casaron; e non deve ser embargado por la costumbre contraria de aquella tierra do fuesen a morar. Esso mismo seria, maguer ellos non pusiessen pleyto entre si; ca la costumbre de aquella tierra do fizieron el casamiento, deve valer, quanto en las dotes, e en las arras, e en las ganancias que fizieron; e non la de aquel lugar do se cambiaron." P. 4, tit. 11, ley 24. "And we say, that the agreement they had made before or at the time of their marriage ought to have its effect in the manner they may have stipulated, and that it will not be avoided by the custom of the place to which they may have removed. And so we say it would be if they had not entered into any agreement; for the custom of the country where they contracted the marriage ought to have its effect as it regards the dowry, the *arras*, and the gains they may have made, and not that of the place to which they may have removed."

Some verbal criticism has been exercised on this law. It is contended by one of the parties, that it only intended to provide for the gains made before the removal of the married couple; or, at all events, that the words used leave the sense doubtful. By the other, that it regulates all, whether made before or after they left the country in which the marriage took place. The expressions used, though not free from all ambiguity, as the appellants have argued, we think ought to receive the construction for which they contend. The law was so understood by the commentators of that day, and the preceding parts of it, compared with the clause in which the obscurity is said to exist, serve to support this interpretation. . . .

Nothing can be more satisfactorily shown than the opinion of the commentators on the statutes of Spain in relation to this particular subject. From the time Gregorio Lopez published his work on the *Partidas*, in the year 1555, down to Febrero, in the year 1781, the writings of no jurist of that country have been produced to us, who treats of this matter, that does not declare that the law of the *Partidas*, already cited, must be limited to property acquired in the place where the marriage is contracted, and that it does not extend to acquisitions made in another country, to which the parties may have removed, where a different rule should prevail. In the long list of writers who have been cited in support of this doctrine are to be found some of the most illustrious of whom the middle ages could boast, — James of Arena, Gulielmus de Cuneo, Dynus, Raynaldus, Jean Favre, Baldus, Alciat, and Ancharanus, Gregorio Lopez, on the 4 *Partidas*, tit. 11, law 24; Matienzo *Commentaria*, lib. 5, tit. 9, nos. 73 and 74; Febrero, p. 2, lib. 1, cap. 4, § 2, no. 62.

Trying the question, therefore, by authority, no doubt can exist, on which side it preponderates, in the country where the statute was passed. Admitting, therefore, for a moment, that the letter of the law of the *Partidas* was violated, by the construction given to it by the commentators; that violation acquiesced in for centuries, by lawyers, courts, and the sovereign authority of the country, makes as much a part of the law of Spain at this day as if the statute had been modified by the power in the State, in whom the right of legislation was vested. In looking into the laws of any country, we stop at the threshold, if we look no further than their statutes; and what we should see there would, in most instances, only tend to mislead. In every nation that has advanced a few steps beyond the first organization of political society, and that has made any progress in civilization, a more extensive and equally important part of the rules which govern men, is derived from what is called, in certain countries, common law, and here, jurisprudence.

This jurisprudence, or common law, in some nations, is found in the decrees of their courts; in others, it is furnished by private individuals, eminent for their learning and integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating, as it were, for their country, and enforcing their legislation by the most noble of all means: that of reason alone. After a long series of years, it is sometimes difficult to say whether these opinions and judgments were originally the effect of principles previously existing in society, or whether they were the cause of the doctrines which all men at last recognize. But whether the one or the other, when acquiesced in for ages, their force and effect cannot be distinguished from statutory law. No civilized nation has been without such a system. None, it is believed, can do without it; and every attempt to expel it only causes it to return with increased strength on those who are so sanguine as to think it may be dispensed with. Duponceau on Jurisdiction, 105. . . .

It is most clear, then, that this interpretation, which limits the law of the *Partidas* to the gains made in the country where the marriage was contracted and excludes from its operation property acquired after a change of residence, comes to us recommended and fortified by every sanction that can give it value in the minds of those who sit in judgment, and whose duty it is to pronounce what the law is, not what it ought to be.

The appellants, however, contend, that although such may be the construction given to the statute in Spain, that construction is not binding on the court, because this is a question of jurisprudence not peculiar to any distinct nation, but one touching the comity of nations, and embracing doctrines of international law, on which the opinions of writers not living in Spain are entitled to equal weight with those who professedly treat of her laws.

The strength of the plaintiff's case rests mainly on this proposition, and it is proper to examine it with the attention which its importance in the cause requires.

But though of importance, it is not of any difficulty. By the comity of nations a rule does certainly exist, that contracts made in other countries shall be enforced according to the principles of law which govern the contract in the place where it is made. But it also makes a part of the rule that these contracts should not be enforced to the injury of the State whose aid is required to carry them into effect. It is a corollary flowing from the principle last stated, that where the positive laws of any State prohibit particular contracts from having effect, according to the rules of the country where they are made, the former should control. Because that prohibition is supposed to be founded on some reason of utility or policy advantageous to the country that passes it, which utility or policy would be defeated if foreign laws were permitted to have a superior effect. On the very subject-matter now before us, the writers who treat of it, although disputing about almost everything else, agree in stating that a real statute, that is one which regulates property within the limits of the State where it is in force, controls personal ones, which follow a man wherever he goes; indeed, it has been expressly, and with great propriety, admitted in argument, that where the personal statute of the domicil is in opposition to a real statute of situation, the real statute will prevail. Boullenois *Disc. Prelim.* p. 21; *ibid.* des *Demis.* quest. 6, 163; Bouhier sur la *Coutume du Duché de Bourgogne*, cap. 23, 461; Rodenburgh de *Statutor. diversit.* tit. 2, cap. 5, no. 6.

If this be true, the question whether the opinions of foreign jurists shall control those of the country where the statute is passed, is at once settled. If the right of a nation to pass the statute, which will affect a contract made in another country, be admitted, the right cannot be contested to her to say whether she has done so or not. She surely is the best and safest expounder of her own laws. And we repeat here, what we said a few days since, on nearly the highest

authority to which we could refer: "That no court on earth, that professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or France, or any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal by which that misunderstanding was to be corrected." 10 Wheat. 159.

And if we did recur to the jurists of France and Holland for information, what would we get in place of the well-established rules in Spain? Much to confuse, and little to enlighten us. We should find great learning and ingenuity exercised by some to show that the law which regulates the rights of property among married persons is a personal one, which follows the parties wherever they go; by others, that it is real, and limited to the country by which it is made. But not one of them denies the power in a nation to pass a law such as has been lately enacted by the State of Louisiana, that a married couple moving into it from another State shall be governed by her laws as to their future acquisitions. None of them professes to comment on the laws of Spain, which her jurists say have the same effect with our late statute; they are not even mentioned by them. How wholly unsatisfactory, therefore, any general reasoning must be on different customs and usages, to prove that the law of the *Fuero* is a personal, and not a real statute, we need not say. . . .

An examination of the different treatises on this subject has convinced us that the greater number of the lawyers of those countries are of opinion that in settling the rights of husband and wife on the dissolution of the marriage, to the property acquired, the law of the place where it was contracted, and not that where it was dissolved, must be the guide. Such was the jurisprudence of the Parliament of Paris. It was the opinion of Dumoulin, of Boullenois, of Rodenburgh, of Le Brun, of Froland, of Bouhier, of Stockmans, of Pothier, and it is that of Merlin. On the other side are found D'Argentre, Cravette, Everard, Vandermeulen, the Parliament of Rouen, the Supreme Court of Brabant, and that of Metz.

But it is evident, the opinions of the greater number of those who think that on the dissolution of the marriage the law of the place where it was contracted should regulate the rights of the spouses to the property possessed by them is founded on an idea which first originated with Dumoulin, that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go.

It is particularly worthy of remark, that Dumoulin, the founder of this system, was of opinion that the statute regulating the community was real, and that it was to escape from the consequences of this opinion he supposed a tacit contract, which, like an express one, followed the parties wherever they went. Such, at least, was the opinion which Boullenois entertained of Dumoulin's sentiments; and

it appears supported by quotations which he makes from his works. Boullenois, *Traite de personalité et de réalité des lois*. Obs. 29, p. 740, 757, 758.

Some of those who have adopted the conclusions of Dumoulin in regard to the marriage contract, treat the idea of a tacit agreement as one which exists in the imagination alone. But the greater number seem to have embraced it; and we are satisfied it is the main ground on which the doctrine now rests in France. So far, therefore, as great names can give weight to any opinion, it comes to us in a most imposing shape, but to our judgment it is quite unsatisfactory.

Admitting it for a moment to be true that when parties married there was a tacit contract between them, their rights to property subsequently acquired should be governed by the laws of the country where the marriage took place; that tacit agreement would still be controlled by the positive laws of any country into which they might remove. This is admitted by Dumoulin himself, who, after treating of the tacit agreement, and stating that the statute is not legal but conventional, "*Statutarium proprie non este nec legale, sed conventitium*," adds, such tacit convention cannot have this effect in another place, where there exists a contrary statute, which is absolute and prohibitive, "*alias si statutum esset absolutum et prohibitorium, non obstantibus pactis factis in contrarium: tunc non haberet locum ultra fines sui territorii*." Dumoulin on the first book of the Code, verbo conc. de stat. et consuet. loc. Froland, *Mémoires sur les statuts*, chap. 4. 63.

If such be the consequence where the statute is prohibitive, we do not see why the same result should not follow from a real statute, which regulates things within the limits of the country where it is in force. The reason for both is the same, namely, that the laws of the country where the contract is sought to be enforced are opposed to it. Why the one should have effect and the other should not, we profess to be unable to distinguish. It may be a question whether the statute is real or not, but the moment it is admitted to be so, it regulates all property acquired within its authority; then, according to the principles of Dumoulin, the tacit agreement can no more control it than it could the law which positively forbade such tacit agreement from having effect. So that even admitting this tacit agreement, we are brought back to the point from which we started; that is, whether the law regulating the right of husband and wife be real or personal?

But without agreeing with those who have treated the idea of Dumoulin as one purely of the imagination, we think that he gives to this tacit consent a much more extended effect than it is entitled to; that in supposing when parties marry, they intend the laws of the place where the contract is made should govern them wherever they go, *he begs the question*; and that the first thing to be settled is, whether these laws do govern them wherever they go.

We are now treating, let it be remembered, of a case such as that before us, where there is no express contract, and the argument is, that the parties not having entered into an express agreement, the presumption must be, they intended their rights to property should be governed by the laws of the country where they married. This is admitted. But then this presumption, as to their agreement, cannot be extended so as to give a greater effect to those laws than they really had. If it be true those laws had no effect beyond the limits of the State where they were passed, then it cannot be true to suppose the parties intended they should have effect beyond them. The extent of the tacit agreement depends on the extent of the law. If it had no force beyond the jurisdiction of the power by which it was enacted; if it was real, and not personal, the tacit consent of the parties cannot turn it into a personal statute. They have not said so; and they are presumed to have contracted in relation to the law, such as it was, to have known its limitations, as well as its nature, and to have had the one as much in view as the other. If the law of Virginia should have been, that for twenty years, the acquisitions made by the parties belonged to one of them, and they married without an express stipulation to the contrary, they would be presumed to have contracted in reference to this limitation of time. If, on the contrary, the law is limited as to place, the tacit agreement which is founded on a supposed consent that the law should govern them, must be considered to have that limitation in view. In one word, the parties are presumed to have agreed, that the law should bind them as far as that law extended, but no further. So that this doctrine brings us back again to the inquiry, was the statute real or personal? Did it extend beyond the limits of the country where the marriage took place, or did it not? Whichever it may be found to be, the parties must be supposed to have contracted. In the absence of anything expressed to the contrary, we cannot presume they intended to enlarge or restrain the operation of the law.

The most familiar way of treating this idea, of tacit contracts, being made in relation to the laws of the country where they are entered into, is to say, that the agreement is to be construed the same way as if those laws were inserted in the contract. Now, supposing parties to marry in Louisiana, and that our statute, providing for the community of acquests and gains, is real and not personal; that it divides the property, acquired while in this State, equally between the husband and wife, but does not regulate that which they gain in another country to which they remove: the insertion of this law in a contract would be nothing more than a declaration, that while residing within this State, there should be a community of acquests and gains. An agreement such as this could not have the same force as an express one, by which the parties declared there should be a community of acquests and gains, wherever they went: for the one has no limitation as to place, and the other has. The maxim, therefore, which was so much pressed on us

in argument, *taciti et expressi eodem vis*, is only true where the law to which the tacit agreement refers contains the same provisions as the written contract.

It was evidently on this distinction the cases of *Murphy v. Murphy*, 5 Mart. R. 83, and *Gales v. Davis' Heirs*, 4 Mart. R. 645, were differently decided in this court. In the former, there was an express contract that there should be a community of acquests and gains between the parties, even though they should reside in countries where different laws might prevail. In the latter there was no express agreement; and the parties were not presumed to have made a tacit one, contrary to the law of the place where they married. They were not supposed to have agreed that a real statute, which governed them only while there, was to follow them as a personal one, and regulate their property in another State. If principles so plain required any authority, we would find it in the very author on whom the appellants principally rely. Dumoulin, after stating that the tacit contract will be controlled by a law that is contrary to it, in the country where the marriage is dissolved, adds: that it will be different where the agreement is express.

“Nisi expresse de tali lucro conventium fuisset, quia pactio bene extenditur ubique, sed non statutum mere.” Froland, *Mémoires sur les statuts*, cap. 4, p. 63.

Having thus stated the reasons why this doctrine of a tacit contract cannot be admitted by us to the extent pressed by the counsel, it only remains for us to examine whether the law of the Fuero was a real or personal statute. We consider it real. It appears to us to relate to things more than to persons; to have, in the language of D'Aguesseau, the destination of property to certain persons, and its preservation in families, in view. It gives to the wife and her heirs the one-half of that which would otherwise belong to the husband. Boullenois, who rejects Dumoulin's idea of a tacit agreement, says the statute which regulates the community is a personal one, because it fixes the State and condition of the spouses; and he goes so far as to declare, that if his adversaries will not allow this doctrine to be correct, then the statute is real, for on no other ground can it be considered personal. We think the State and condition of both husband and wife are fixed by the marriage, in relation to everything but property, independent of this law; and as it regulates property alone, it is not a personal statute. Boullenois, *Traite des statuts*, cap. 5, obs. 29, p. 751; cap. 2, obs. 5, 80.

Upon reason, therefore, but still more clearly on authority, we think the appellants have failed to make out their case. We know of no question better settled in Spanish jurisprudence, and what is settled there cannot be considered as unsettled here. The jurisprudence of Spain came to us with her laws. We have no more power to reject the one than the other. The people of Louisiana have the same right to have their cases decided by that jurisprudence as the subjects of Spain have, except so far as the genius of our government, or our posi-

tive legislation, has changed it. How the question would be decided in that country if an attempt were made there on the authority of French and Dutch courts and lawyers, to make them abandon a road in which they have been travelling for nearly three hundred years, we need not say. The question is sufficiently answered by the *auto* already cited, in which the adoption of the opinions of foreign jurists, in opposition to those of Spain, is reprobated and forbidden.

We conclude, therefore, that a community of acquests and gains did exist between the insolvent and the mother of the appellees from the time of their removal into this State; and that the court below committed no error in placing them on the *bilan* as privileged creditors, for the amount of those acquests which remained in their father's possession at the dissolution of the marriage.<sup>1</sup>

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SMITH v. McATEE.

COURT OF APPEALS OF MARYLAND. 1867.

[Reported 27 *Maryland*, 420.]

CRAIN, J. The attachment in this case was issued by the appellee to affect the proceeds of sale of the real estate of the wife, to pay the debt of the husband. The facts as presented in the record are, that Nicholas Leister and wife were citizens of this State until August, 1854, when they removed to Illinois, where they resided when this attachment issued. Before removing from the State Leister became indebted to the appellee, who has always resided in Washington County, Maryland. The fund in controversy was derived from the sale of the real estate of Mary Gehr, the mother of Sarah Leister, the wife of Nicholas.

Mary Gehr died in 1855, leaving real estate in Washington County, and by her last will and testament devised a child's share of said estate to Sarah, the wife of Nicholas. In January, 1856, a bill was filed in the Circuit Court for Washington County against Leister and wife and the other devisees, for the sale of the real estate for partition. The bill was answered by Leister and wife. In their answer Sarah, the wife of Nicholas, claimed her portion of the estate as her sole and separate estate, free from the debts of her husband, and insisted that the same should not be divested from her by a sale thereof. Nicholas, the husband, disclaimed all right, title, or interest at law or in equity to any portion of the estate of Mary Gehr, by virtue of his marriage with the said Sarah or otherwise. A decree was passed in the cause

<sup>1</sup> This case is generally followed in this country, title in after-acquired personal as well as real estate vests according to the law of the new domicile. *Besse v. Pellochoux*, 73 Ill. 285; *Long v. Hess*, 154 Ill. 482, 40 N. E. 335; *Hyman v. Schlenker*, 44 La. Ann. 108; *Muns v. Muns*, 29 Minn. 115; *Gidney v. Moore*, 86 N. C. 484; *Castro v. Illies*, 22 Tex. 479; *Fuss v. Fuss*, 24 Wis. 256. —ED.



on the 12th of August, 1856, for the sale of the property, and in the decree it was provided that the proportion of the proceeds of the sale of the property allotted to Sarah should be deemed her separate estate, for her sole and separate use and benefit, free from any claim or control of her husband or his creditors. After the sale of the property the amount of the proceeds due Sarah was credited to her sole and separate use, and paid over to the appellant as her attorney, when it was attached by the appellee to pay the debt of her husband.

At the trial of the cause two bills of exception were taken by the appellant; the first to the admissibility of evidence, and the second upon the granting of the plaintiff's and the rejection of the defendant's prayers. To arrive at a proper solution of the questions to be determined by this appeal, we must ascertain the rights of Sarah, the wife, under the will of her mother and the proceedings and decree of the court, and whether the proceeds of the estate audited to her and received by Mr. Smith, as her attorney, were liable to be attached in our courts for the payment of the husband's debt. In 1841, the legislature, recognizing the just and equitable right of the wife to the enjoyment of her real estate, passed a law to protect the real estate of the wife from the debts of the husband. This legislation in favor of the wife against the creditors of the husband so favorably impressed itself upon the public mind. that by the 38th section of the 3d article of the constitution of 1851, the legislature was required to pass laws necessary to protect the property of the wife from the debts of the husband during her life, and for securing the same to her issue after her death. The legislature, acknowledging the wisdom of this provision, in obedience to the mandate of the constitution, enacted the law of 1853, chapter 245. That act provides that *all* the property of the wife acquired or received, after her marriage, by purchase, gift, grant, devise, bequest, or in a course of distribution, shall be protected from the debts of the husband, and not in any way be liable for the payment thereof. And to effect the objects of the law, the wife was given the benefit of all such remedies for her relief and security as then existed, or should be devised in the courts of law or equity, without the necessity of the interposition of a trustee. The object contemplated by this law is too clear for doubt; by its enactment the legislature intended to give full protection and security to the property of the wife against the creditors of the husband, as previous to its enactment the cases of *Peacock v. Pembroke and Clarke*, 4 Md. Rep. 280. and *Turton's Ex'rs v. Turton*, 6 Md. Rep., 375, had been decided by this court, and in each case the property was adjudged to be the husband's and subject to the payment of his debts. This act, soon after its passage, received a judicial interpretation in the case of *Unger and Wife v. Price*, 9 Md. Rep., 552. In that case, Mrs. Unger had sold her potential right of dower, and invested the money in personal property, and it was held by this court to be exempted from the debts of the husband. The case of *Mrs. Leister* is equally strong, and comes

within the principle settled in *Unger and Wife v. Price*. She was the devisee of real estate, and with the consent of her husband the proceeds of sale of the property under the decree of a court of equity were held to her sole and separate use, so audited to her and paid over to the appellant. But the appellee insists, that the proceedings and decree were not admissible evidence against him, because they were *res inter alios acta*. We admit, as a general rule, that judgments and decrees are evidence binding only between parties and privies. But there are many exceptions to this rule, and we are of opinion that this case forms one of the exceptions and comes within the principle settled by this court in the case of *Key v. Dent*, 14 Md. Rep. 96. The record was introduced in this case to show how the fund was derived, and that the conversion from realty into personalty was not to prejudice the rights of the wife. For that purpose, according to the decision in *Key v. Dent* and the authorities relied on by Justice Eccleston, who delivered the opinion of the court, the record was evidence. *Head's Rep's. v. McDonald*, 7 Mon. 207; 4 Phillips on Evidence, 920, 921, 977 (ed. of 1843). The record was confirmatory of the answers of the garnishee and proof that the decree was had as there set forth. It was a decree of a court of competent jurisdiction, which in the exercise of its powers as a court of chancery settled the property to the sole and separate use of Mrs. Leister. And although we find this right of the wife to her property, protected in this State by public policy, by statute, and by a decree of a court of equity, yet it was earnestly contended by the learned counsel for the appellee, that a creditor of the husband had a right to attach this fund in our courts of justice for the debt of the husband, as by the laws of Illinois, where the husband and wife resided, the husband was entitled to all the personal property of the wife, and that by virtue of this law of the domicile the fund was vested in the husband. And he claimed this right to divest the wife of her property by the law of the domicile, on the ground of comity. In this case we cannot sanction such a right, for it has been decided that comity is overruled by positive law, and that it is only in the silence of any particular rule, affirming, denying, or restraining the operation of foreign laws, that courts of justice presume a tacit adoption of them by their own government. *Gardner v. Lewis*, 7 Gill, 395. It is certainly competent for any State to adopt laws to protect its own property as well as to regulate it, and "no State will suffer the laws of another to interfere with her own, and in the conflict of laws, when it must often be a matter of doubt which shall prevail, the court which decides will prefer the laws of its own country to that of the stranger." *Story's Conflict of Laws*, § 28. The courts of our State have perfect jurisdiction over all personal property as well as real within its limits, belonging to the wife, and they have a right to protect both from the debts of the husband. If therefore our legislative enactment in regard to the property of the wife and the laws of Illinois conflict, it cannot be made a question in our own courts which shall prevail. "Where

there is no constitutional barrier, we are bound to observe and enforce the statutory provisions of our own State." *Davis v. Jacquin*, 5 Har. & J. 109; *Gardner v. Lewis*, 7 Gill, 395.

As this fund by our laws is held by the appellant for the sole and separate use of Mrs. Leister, a creditor of the husband seeking a remedy against him in our courts must be governed and regulated by our laws; for Justice Story says: "A person suing in this country must take the law as he finds it, and wherever a remedy is sought, it must be administered according to the *lex fori*; and such a judgment is to be given as the law of the State where the suit is brought authorizes." Story's *Conflict of Laws*, §§ 571, 572. And in this court, in the case of *Wilson & Co. v. Carson & Co.*, 12 Md. Rep. 75, Le Grand, Chief Justice, says: "The recognition of the laws of another State, in the administration of justice in this, is not a right *stricti juris*; it depends entirely on comity, and in extending it, courts are always careful to see that the statutes of their own State are not infringed to the injury of their own citizens."

We think these authorities decisive of the question, and that the appellant has a right to rely in a court of law upon the title of Mrs. Leister to the fund in controversy. Her right had not been divested by her own act or by operation of law, and the fund in his hands was not liable to be attached by the creditor of the husband.

The views which we have expressed of the legal propositions governing this case are conclusive upon the right of the plaintiff to recover, and it is unnecessary to examine the first bill of exceptions, to ascertain whether the evidence offered by the defendant of the laws of Illinois touching the rights of husband and wife were admissible or not. It follows from what we have said, that the instructions given by the court at the instance of the plaintiff and contained in the second bill of exceptions were erroneous. The prayers asked by the defendant's counsel embrace in our opinion the true theory of the law of the case and ought to have been granted. For these reasons we reverse the judgment of the Circuit Court.

*Judgment reversed, without procedendo.*<sup>1</sup>

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### HARRAL v. HARRAL.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1884.

[*Reported 39 New Jersey Equity*, 279.]

FREDERICK F. HARRAL was born in Connecticut in 1842. He graduated at Yale College in 1863, and at the College of Physicians and

<sup>1</sup> *Acc. Loftus v. Bank*, 133 Pa. 97. As soon as the proceeds of a married woman's separate real estate are transmitted to the matrimonial domicile, they are held according to the law of the latter place. *Castleman v. Jeffries*, 60 Ala. 380. — Ed.

Surgeons in New York City, in 1868. He was married on the 20th of February, 1877, before the deputy mayor, in the city of Paris, to Clarice Marie Le Gars, a Frenchwoman. In May, 1878, he returned to this country, and died at Kirkbride's hospital for the insane, in Philadelphia, July 5, 1881.

On the 9th of July, 1869, and before his departure for Europe, the decedent duly made and executed a will, devising and bequeathing all his property, real and personal, to his brother and sisters, and appointing William Creighton Peet and Hamilton Wallis executors. This will was admitted to probate in the prerogative court of this State on the 31st of July, 1882.

The widow filed this bill in the Court of Chancery of this State, to which the legatees under the will of her husband and the executors are parties.

The prayer of the bill is that the personal estate of the decedent, so far as concerns the complainant's interest therein, should be distributed in accordance with the laws of France.

On final hearing, on bill answer and depositions, the chancellor made a decree in accordance with the prayer of the bill. From that decree the defendants appealed.

DEPUE, J. The law of France in relation to the rights of husband and wife in the property of either spouse is established by the Code Napoléon. Before the French Revolution, the northern provinces of France were under the customary law, and the community of property governed the nuptial contract; in the southern provinces the Roman law prevailed, and the contract was governed by the dotal system. The Code Napoléon left the parties to elect the law by which the marriage should be governed; and if no election was made, the community system was to prevail. 2 Kent, 187, note. Section 1391 of the Code provides that the parties may declare in a general manner that they intend to marry either under the law of community or under the law of dowry. The community is either legal or conventional. Legal community is established either by a simple declaration that the parties marry under the law of community, or by a marriage without any contract on the subject. Sections 1400, 1497. There was no marriage contract between these parties with respect to property; and if disposition of the personal estate in question is to be made by the French law, it must be disposed of as community property.

Community is divided by the Code into two classes — active and passive. The former relates to the disposition of property; the latter, to liability for debts. The property which is comprised in the community consists of (1) All the movable property which the married parties possessed on the day of the celebration of the marriage, and all movable property which falls to them during the marriage, by succession, or even by donation, if the donor has not expressed himself to the contrary; (2) All the fruits, revenues, interest, and arrears of what nature soever they may be, fallen due or received during the marriage,

and arising from property which belonged to the married persons at the time of the celebration of the marriage, or from such as has fallen to them during the marriage by any title whatsoever; and (3) All immovable property acquired during the marriage. Section 1401. This community, whether it be conventional or legal, commences from the day of the marriage contracted before the officer of the civil power. Section 1399. During the coverture the husband has the custody, control, management, and power of disposition (under some restrictions) of the community property (sections 1421, 1422); and he may make a testamentary disposition of his portion of the community property, but of no more. Section 1423. After the death of the husband the wife may accept or renounce the community. Section 1453. If she accept it, her share — that is, the one-half part of the community property — is given to her, subject, in the partition, to certain specified deductions and allowances by way of compensation. Sections 1467, 1480.

The complainant, in her bill, charges that the legal domicile of the decedent, at the time of his death, was in France, and insists that from the time of the celebration of her marriage with the testator, by force and operation of the laws of France, a legal community was established between her and her husband as to all the personal or movable property possessed or owned by either of them during the marriage, and in all the fruits, revenues, interest, and income thereof; and that upon the death of the testator she was entitled to have and receive, absolutely, for her own use and benefit, the one-half part of all such property so held in community between herself and her husband, and that it was not in the power of her husband to dispose of that share or interest in said property, which, by the laws of France, belonged to her.

The defendants, in their answer, admit that the testator was married to the complainant on the 20th of February, 1877, at Paris; but they say that the marriage was void for the reason that the testator at that time was of non-sane mind, and incompetent to enter into a contract of marriage. They admit that the testator lived in Paris for five years before his marriage, but deny that his legal domicile was, at the time of his marriage, or at any time, in France, and insist that distribution of his personal estate should be made under the laws of New Jersey. They also say that by the law of France no man can become domiciled in France without he shall have first applied to the French government for permission to do so, and obtained an express authorization from the government to establish such domicile, and that the testator never obtained an authorization to establish his domicile in France, and never became domiciled there by the laws of that country.

The chancellor, in his opinion, considered the evidence on the subject of the testator's mental condition at the time of his marriage, and reached the conclusion that the testator was not at that time mentally incapacitated to contract marriage or to change or establish his domi

cil. The evidence shows that the decedent, for some time, had been addicted to intemperance, and that his physical and mental vigor had been impaired by indulgence in drink; but it falls short of proof that, at the time of his marriage, his mental faculties had become so impaired as to incapacitate him from entering into a contract of marriage, or from deciding upon the place of his domicile. The answer contains no allegation of fraud or imposition upon the decedent in procuring the marriage. The case turns wholly upon the applicability of the community law to the testator's personal estate in the hands of his executors.

When the testator went abroad in 1869, his property consisted of personal estate, and a house and lot in Bridgeport, Connecticut. The personal estate he left in charge of Mr. Wallis, to be invested and cared for, and it remained in charge of the latter during the lifetime of the decedent. This personal estate, amounting to about \$50,000, at the testator's death came to the hands of the executors. This controversy relates wholly to the personal estate.<sup>1</sup> . . .

The complainant's counsel contended that inasmuch as the marriage was celebrated in France, the wife, immediately on her consummation of the marriage, acquired a vested right in her husband's property, independent of any question of domicile, and that her right in the personal property of the husband was a *jus* acquired by the marriage by virtue of the French law, which could not be invalidated by any extraneous circumstances. This view has had some support in the opinions of writers on international law, but is contrary to the course of decision in the courts of this country, and, I may add, to the later decisions of the courts elsewhere. The doctrine generally adopted and supported by reason and public policy is, that a marriage celebrated according to rites and ceremonies recognized by the laws of the country where the marriage takes place, is valid everywhere; and, as a general rule (not without exceptions), by that law the capacity of the parties to contract a marriage is determined. Whart. on Confl. of Laws, §§ 161, 162, 164; Story on Confl. of Laws, §§ 113, 113 *a*, 114, 123 *b*, 124, 124 *a*; Bish. on Marr. and Div. §§ 357, 359, 363, 370; Moore v. Hegeman, 92 N. Y. 521. But with respect to the property rights of husband or wife in the personal property of either, derived from the marriage relation, the place where the marriage was celebrated is not decisive; these rights depend on what is known in law as the matrimonial domicile. Le Breton v. Nouchet, 3 Mart. (La.) 60, 81; Ford v. Ford, 2 Mart. (N. S.) 574; Allen v. Allen, 6 Rob. (La.) 104; Kneeland v. Ensley, Meigs (Tenn.) 620; Glenn v. Glenn, 47 Ala. 204; Mason v. Homer, 105 Mass. 116; Story on Confl. of Laws, §§ 186, 193; 2 Pars. on Cont. 590. Mr. Wharton says that the place of the celebration is not necessarily the place of the performance of the marriage, which, he says, the later jurists have agreed is its true legal site, and that this place of performance is the matrimonial domicile to which the husband and wife propose

<sup>1</sup> Here follows a discussion on domicile, for which see *ante*, Vol. I. p. 195. — ED.

to repair. Whart. on Confl. of Laws, § 192. On the marriage, the legal presumption is that the wife takes the domicile of her husband, and her rights are subject to the law of his domicile; but that presumption is overcome, and the legal inference is superseded when, on the marriage, the parties adopt a place for their matrimonial domicile—in which event the matrimonial domicile will control, and will regulate the property rights of the parties in movables.

The authorities are quite generally in accord in selecting the matrimonial domicile as the place which shall furnish the law regulating the interests of husband and wife in the movable property of either, which was *in esse* when the marriage took place. Perplexing questions sometimes arise as to what place shall be deemed the true matrimonial domicile in the sense of this rule. Mr. Justice Story supposes a case where neither of the parties has a domicile in the place where the marriage was celebrated, and the parties were there *in transitu*, or during a temporary residence, or on a journey made for that sole purpose *animo reverendi*, and says that the principle maintained by foreign jurists in such cases would be that the actual or intended domicile of the parties would be deemed to be the true matrimonial domicile; or, to express the doctrine in a more general form, that the law of the place where, at the time of the marriage, the parties intended to fix their domicile would govern all the rights resulting from the marriage. He also supposes the case of a man domiciled in one State marrying a lady domiciled in another State, and says that foreign jurists would hold that the matrimonial domicile would be the domicile of the husband if it was the intention of the parties to fix their residence there, or the domicile of the wife if it was their intention to fix their residence there, or in a different place from the domicile of either the husband or wife if they intended to establish their matrimonial domicile in some other place. He then refers to the decisions of the courts of Louisiana, adopting the same principle, and concludes that, "under these circumstances, where there is such a general consent of foreign jurists to the doctrine thus recognized in America, it is not, perhaps, too much to affirm that a contrary doctrine will scarcely hereafter be established; for, in England as well as in America, in the interpretation of other contracts, the laws of the place where they are to be performed has been held to govern. Treated, therefore, as a matter of tacit matrimonial contract (if it can be so treated), there is the rule of analogy to govern it; and treated as a matter to be governed by the municipal law to which the parties were, or meant to be, subjected by their future domicile, the doctrine seems equally capable of a solid vindication." Story's Confl. of Laws, §§ 191–199. All perplexity on this subject is removed where, as in this case, the place where the marriage is celebrated, the domicile of the wife, and the establishment of a home after the marriage, concur. The place of contract and the place of performance being the same, on legal analogies there would seem to be no doubt that that place would be the matrimonial domicile, and that the incidents of the marriage would be determined by the law of that place.

Nor can that question, which has given rise to great diversity of opinion where new property has been acquired after the marriage, and in a new domicile, arise in this case, for the property to which this controversy relates was *in esse* at the time of the marriage, and the matrimonial domicile then established continued until the husband's death; and it is universally allowed that, when a marriage takes place without settlement, the mutual rights of the husband and wife in each other's movable property are to be regulated by the law of the matrimonial domicile, so long as that remains unchanged. Westlake's Int. Law, § 366.

The French law recognizes a conjugal domicile analogous to what is known in our law as a matrimonial domicile, and is distinguished from that domicile which is required for the purpose of contracting a lawful marriage; and the law of that country, with respect to the effect of the conjugal domicile upon the rights of husband and wife in the movable property of either spouse, is in accordance with the views above expressed. George Merrell, a witness called by the defendants, who is not an attorney or *avocat* in the French courts, being a foreigner who studied law in New York City, said that a foreigner cannot acquire a domicile in France without complying with Article 13 of the Code, except it be a matrimonial domicile, which he defines to be the residence necessary to confer jurisdiction on the magistrate for the celebration of the marriage; and that in the case of an American citizen establishing his residence in France, with intention of making that his permanent home, marrying and living there, not having received the government authorization, according to the Code, his personal property would be distributed according to the American law. On the other hand, M. Goiraud, a French lawyer called by the complainant, testified that the domicile necessary for a foreigner to contract a legal marriage required only a residence, in fact, for six months, and that the domicile which was to govern the marriage relations of the parties would be the conjugal domicile, which he defined to be the domicile which had been chosen by the parties, either at the time of the marriage or after the marriage, in order to be finally settled. M. Clunet, *avocat* of the court of Paris, called by the complainant, testified that French jurisprudence, in order to establish the marriage relation of the parties married without a contract, takes, as a principle, their supposed intention, and finds the expression of that intention in what is called the conjugal domicile, or, in other words, the place where, after the marriage, the parties establish themselves. Both these witnesses agree that government authorization is not required for the establishment of a conjugal domicile in France, which, when the marriage is celebrated in France without a contract, will make the property of a foreign-born husband subject to the community law.

The decisions of the French courts sustain the opinions given by M. Goiraud and M. Clunet. In Breul's Case, Sirey (1854), 2,105, translated in 4 Phillim. Int. Law, 226, and more fully in Cole on Domi-



cil, 45, 47, Breul was a Hanoverian; he married a Frenchwoman in France, and died there; at the time of his marriage, and at his death, he was domiciled in France, but had not obtained a governmental authorization for that purpose. On appeal, the question was whether there was a community of goods between husband and wife. The court held that there was, and that foreigners were capable of entering into all contracts depending on the law of nations, and could, when they marry in France, accept tacitly the rule of community, established by law, in the same way as they might have made that rule the subject of express stipulation in a formal contract; that, to make this principle apply to foreigners, it was not enough that the marriage was celebrated in France; but that it was also necessary that the intention of the contracting parties to adopt the community should be manifested by affirmative acts; that the establishment of a domicile in France had always been regarded as the most positive manifestation of such intention; that the domicile ought to have an importance to distinguish it from simple residence, but it was not necessary that it should have been authorized by the government under Article 13, for the reason that the object of this authorization was to confer on the foreigner all the civil rights of native-born Frenchmen, and that these rights were not necessary in a foreigner in order to enable him to enter into matrimonial conventions, which are purely of the *jus gentium*.

In *Lloyd v. Lloyd*, Sirey (1849), 2, 220; in *Cole on Domicil*, 37, and translated in a note to *Whicker v. Hume*, 13 Beav. 401, James Lloyd, a foreigner, whose birthplace was unknown, and who was, by presumption and residence, an Englishman, came to France, and established himself there permanently. In 1836 he married, at Paris, a Frenchwoman, without a marriage settlement. He had three children by the wife before marriage, and three afterwards. He continued his residence, and died in Paris, leaving his wife and the six children surviving him. The widow claimed, before the French court, that portion of the property which would belong to her by the French law, if she and her husband were married under the *régime* of the *communauté des biens*. Her right depended on whether, at the time of the marriage, the decedent had a legal domicile in France. He never had applied for or obtained an authorization under Article 13 of the Code. The Tribunal of the Seine decided against her claim, but the decree was reversed by the Court of Appeal, and the claim of the widow sustained. The court said that "it is fruitless to contend that the domicile of James Lloyd, in France, was not accompanied by the authorization of the government, required by Article 13, and therefore it cannot be taken into consideration as regulating the conjugal domicile, for it is a fixed principle of law, as well before as since the Code, that a foreigner, even when he preserves that quality, could acquire a domicile in France; that Article 13 of the Code did not intend to change this state of things; that it is only when a foreigner wishes to possess such a domicile in France, as will confer upon him all civil rights, that the

authorization of government is required ; that in the present case it is not a question as to a civil right, exclusively appertaining to a French citizen ; that the tacit agreement as to the community of goods, resulting from submission to Articles 1393, 1399, 1340, and the succeeding articles, was purely derived from the law of nations."

In Fraix's Case, Fraix was a Savoyard, and settled in Paris, where he married his second wife, a Frenchwoman. The question was whether he married under the French *communauté des biens*. The court held that although he had not been authorized by the government to establish his domicile in France, a domicile was not necessary to make the *communauté* applicable, which is presumed to have been the intention of the parties when they fixed themselves in France. 4 Philim. Int. Law, 231.

In Ghisla's Case, decided in 1878, Ghisla was a Swiss by birth. He married a Frenchwoman in France, and before and after his marriage had his domicile in Marseilles, and in that place died. His widow claimed the benefit of the community law, and it was adjudged to her by the court of Aix, the ground of the decision being that, where one of the married couple is French, and the other a foreigner, they are, in the absence of a contract, governed by the law of the conjugal domicile ; that the intention of the parties is to be considered before their nationality, and that to the fixing of the conjugal domicile, government authorization was not required, for whatever appertains to the marriage belongs rather to the *jus gentium* than to the civil law, properly speaking. Jour. Int. Law, 1878, 610. In Dagès v. Laborde, it was held that the legislation applicable to the civil interests of a marriage was that of the place where the married couple established their domicile immediately after the marriage, and where it appeared that it was their intention to fix the principal place of their business, and to raise their family, and that this domicile was denominated their matrimonial domicile. Court of Pau, 1835, affirmed in the Court of Cassation, December, 1836, Journal du Palais, 1837, 1, 537.

Giovanetti v. Orsini, Sirey (1855), 699, is the converse of the cases cited. In that case a Frenchman, while domiciled in Tuscany, married an Italian woman in Florence. They afterwards removed to France. On her death, the question arose in France as to the matrimonial *régime* governing the estate of the deceased wife. There had been an agreement, subsequent to marriage, with respect to property, not valid under the French law. The court held that the marriage having been contracted at Florence, and the parties having, at the epoch of their marriage, fixed their matrimonial domicile in Tuscany, the marriage was necessarily under the influence of the Roman law, which governed such matters in Tuscany, according to which, agreements subsequent to marriage were authorized and valid. Cole on Domicil, 41.

Morand v. Commune de Mézère, Sirey (1873), pt. II., 148, much relied on by the defendants, is not in point. The parties were married in Sardinia, and then removed to France. The husband settled in

Paris, and had his principal establishment there, but did not obtain authorization from the government. His daughter was born in France. He died in 1855, and his widow in 1867, making the commune her residuary legatee. The court held that Morand was a foreigner, and so were his wife and daughter, and therefore the laws of France did not govern the succession. The effect of a French marriage, followed by a conjugal domicile in France, was in no wise involved.

I think it is clearly shown, not only by the testimony of the French lawyers, who were witnesses in this case, but also by the French decisions, that it is the law of that country that the marriage of a foreigner in France, without any contract, followed by a conjugal domicile in France, will subject the property of the married persons to the community law, and that a government authorization under Article 13 of the Code is not necessary to the establishment of such a domicile.

The decree of the chancellor should be affirmed.

*Decree unanimously affirmed.*<sup>1</sup>

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### BOND v. CUMMINGS.

SUPREME JUDICIAL COURT OF MAINE. 1879.

[*Reported 70 Maine, 125.*]

LIBBEY, J. This is trespass against the defendant, as sheriff of Aroostook County, for a mare. The defendant justifies the taking by his deputy by virtue of an attachment of the mare as the property of John Bond, the plaintiff's husband, on a writ in favor of R. S. Starrett against him.

The plaintiff claims title to the mare by virtue of a purchase from her husband while living with him, and having no separate support, in the province of New Brunswick, from which province they moved into this State about the time of the attachment. No purchase is claimed to have been made in this State.

By the law of New Brunswick a married woman, living with her husband and having no separate maintenance, cannot acquire title to property by purchase from him. The validity of the contract under which the plaintiff claims title must be determined by the law of that province.

"Matters bearing upon the execution, the interpretation, and the

<sup>1</sup> *Acc. Mason v. Fuller*, 36 Conn. 160; *Davenport v. Carnes*, 70 Ill. 465; *Brien v. Marchildon*, Rep. Jud. Quebec, 15 C. S. 318.

This is true even though the marriage was abroad at the woman's domicile, and the wife always remains there. *Succession of McKenna*, 23 La. Ann. 360; *Breton v. Miles*, 8 Paige, 261; 18 Clunet, 549 (French Cass. 9 March, '91); 19 Clunet, 1068 (Geneva, 18 March, '82). — ED.

validity of a contract are determined by the law of the place where the contract is made." *Scudder v. Union National Bank*, 91 U. S. 406. Story, Conf. of Law, §§ 242, 243.

Bringing the mare into this State gave the plaintiff no title which she did not acquire by virtue of the purchase from her husband, by the law of New Brunswick; and the mare was legally attachable here as the property of the plaintiff's husband. *Plaintiff nonsuit.*<sup>1</sup>

### FRIERSON *v.* WILLIAMS.

SUPREME COURT, MISSISSIPPI. 1879.

[Reported 57 Mississippi, 451.]

GEORGE, C. J.<sup>2</sup> The plaintiff in error filed his bill in the Chancery Court of Coahoma County against John Williams and his wife for the purpose of collecting out of the separate estate of Mrs. Williams a note for six thousand and fifty dollars, made by Williams and wife, in February, 1873, payable to the order of Williams, the husband, and by him indorsed to the plaintiff in error for money then advanced by the latter to said Williams. The note was made at New Orleans, in the State of Louisiana, where Williams and his wife reside. The property sought to be charged with the debt is land situated in Coahoma County, and is the separate estate of Mrs. Williams, under a devise made to her by her sister, Mrs. McGuire, who died in 1863. By her will she provided as follows: "My whole estate, real and personal, shall go to my sisters, Ellen Mayes, wife of R. B. Mayes, and Louisa Williams, the wife of John Williams, for and during their natural lives; and this bequest is to their sole and separate use in which their husbands respectively shall have no right or interest." . . .

It is next insisted that by the law of Louisiana the promissory note of the wife, made as surety for her husband, is void for want of the capacity of the wife to enter into such a contract, and that, being void by the *lex loci contractus*, it is void everywhere. This position is true,

<sup>1</sup> So generally, when personal property falling to the wife becomes the husband's by the law of their domicil, a subsequent change of domicil will not alter the existing rights of the husband. *Cahalan v. Monroe*, 70 Ala. 271; *Lichtenberger v. Graham*, 50 Ind. 288; *Lyon v. Knott*, 26 Miss. 548; *Davis v. Zimmerman*, 67 Pa. 70. And so as to the wife's rights in her husband's chattels; *Kraemer v. Kraemer*, 52 Cal. 302.

Conversely, where personal property falling to a wife becomes her separate estate, removal into another State does not affect her rights. *Hinman v. Parkis*, 33 Conn. 188; *Townes v. Durbin*, 3 Met. (Ky.) 352; *Reid v. Gray*, 37 Pa. 508.

When a wife becomes trustee of personal property in accordance with the law of the domicil, she continues to hold the position after removal. *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 22 N. E. 572. — Ed.

<sup>2</sup> Part of the opinion only is given. — Ed.

if the giving of the note has no other effect than what it purports to have on its face, viz., a personal obligation of the wife. But it is charged in the bill and admitted by the demurrer, that at the time this note was made in Louisiana the wife had a separate estate in realty, situated in this State, and that she contracted with reference to this separate estate, and intended to charge it by the promissory note in controversy. Whether this purpose can be carried out with reference to realty here, notwithstanding the fact that the note is void by the law of Louisiana, is the question presented for our consideration. The note, if made here, would be equally void by our laws to bind the wife personally; yet, notwithstanding this, it would be held, if made with the intent and purpose alleged in the bill, to be a valid charge against her separate estate situated here.

It is generally true that the capacity of a married woman to make a contract will be determined by the law of her domicile: but this is not the rule when her contract relates to her estate in realty, situated in another jurisdiction. Judge Story says: "The general principle of the common law is that the laws of the place where such [immovable] property is situate exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed, and lost only according to the *lex rei sitæ*." Story, Conf. Laws, § 424. And quoting from Sir William Grant: "The validity of every disposition of real estate must depend upon the law of the country in which that estate is situated;" he says: "The same rule would also seem equally to apply to express liens and to implied liens upon immovable estate." Mr. Burge, as quoted by Judge Story, in a note to section 445 of the same work, says: "The power to alienate immovable property by contract was a quality impressed on the property; that the law from which it was derived, or by which it is regulated, was a real law; and that the existence of this power and the validity of its exercise must be decided by the law of the country in which the property was situated." And it is said by a learned author: "No sovereignty can permit the intrusion on its soil of a foreign law. Such a law may be accepted by comity in cases in which a contested issue, the law applicable to which is foreign, comes up for determination in a home court. But the imposition of any other law than the *lex rei sitæ* as to property, would be to give foreign subjects and foreign laws an absolute control, unchecked by any discretion of the home courts, over a subject-matter essential not merely to the independence, but the vitality of the State. . . . The mischief is cured by the adoption of the rule *lex rei sitæ regit*; whoever may be the owner, or wherever the contract was made, the law of the land reigns. No other law, either as to the transfer or control of the property, is to intrude." Wharton, Conf. Laws, §§ 278, 280. These rules apply to marital rights in realty. Judge Story, after speaking of the rights of husband and wife as to personal property situated beyond the mat-

rimonial domicil, says: "But real or immovable property ought to be left to be adjudged by the *lex rei sitæ* as not within the reach of any extraterritorial law;" and in *Vertner v. Humphreys*, 14 S. & M. 130, 143, this court said that, "As to immovable property, the law of the place where it is situated fixes the rights of husband and wife in it."

The application of these principles will furnish a safe solution of the question under consideration. The capacity of Mrs. Williams to take this property, and her rights and powers over it, are derived from and regulated by the law of this State. Her power of disposition and dealing with it are, by our laws, impressed on the property itself. As to none of these things has the law of Louisiana the slightest influence. If she had made a contract expressly disposing of this property, it will not be denied that, though void by the laws of Louisiana, either for her want of capacity to act, or the want of the observances of the forms and solemnities prescribed by those laws, yet, if valid by the law of this State, it would have been good. The contract here is not strictly of that character, yet the making of it is the exercise of the power of the wife to dispose of her estate; for whenever that power is denied, the power to charge it with her debts is denied also, and the charge can only be made effectual by the actual or threatened alienation of the estate, under a decree of the Chancery Court. The charging of her separate estate for the payment of money does not pass any actual interest in the land, but it is the first and essential step for a judicial disposition of the estate to satisfy the charge, and the exercise of a power of administration and control over it, which, as we have seen, is governed solely by the *lex rei sitæ*. To show that this is its true nature, we have only to suppose that, by the law of Louisiana, the note was a charge on her realty situated there, and was not by our law a charge on the realty situated here. In such a case, it would be evident that an attempt to enforce it here against her real estate could not succeed. If success could attend such an effort, then the several rights and powers of husband and wife, as to realty, would not be fixed and governed by the laws of the situs; and the act of a wife, done in a foreign State, would have the effect of disposing of her realty here, contrary to our laws.

But there is no real conflict between the laws of Louisiana and Mississippi in reference to the contract. By both laws the note is void for what it purports to be on its face, — a personal obligation of the wife; and it is void for the same reason in both, viz., the personal incapacity of the wife. The difference between the two laws is as to the effect on the real property of the wife in the respective jurisdictions of the two States, and as to which, as we have above seen, the law of the State in which the realty is situated is the exclusive test. If the note had not been void by our laws, as the personal obligation of the wife, we should nevertheless, out of comity to a sister State, adjudge it void to that extent, if attempted to be enforced here: but the principle of

comity does not require a State to regard the laws of any other State, so far as they may affect contracts in relation to real estate situated in the former State.

*Decree reversed, demurrer overruled, and cause remanded.*<sup>1</sup>

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BONATI v. WELSCH.

COURT OF APPEALS, NEW YORK. 1861.

[*Reported 24 New York, 157.*]

ACTION by a widow residing in France, against the executors and legatees of her deceased husband, to recover the value of certain real estate inherited by her, which was sold with her assent, and the proceeds received by her husband while she was living and domiciled with him in France.<sup>2</sup>

DAVIES, J. By section 1387 of the Code Napoléon, the law in reference to the conjugal relation is prescribed in default of special agreement; and by section 1393, in default of special stipulations, the law of community prevails. By sections 1401 and 1402, the community consists of such movable property as falls to either party during the marriage by any title whatever, and all immovables acquired during marriage. By section 1404, the immovables which fall to them during marriage by title of succession do not enter into the community. Section 1433 provides that if an immovable belonging to one party be sold and the price paid into the community, there is ground for the deduction of the price so paid in from the community for the benefit of the party who was proprietor of the immovable sold. Section 1436 declares that recompense for the price of an immovable belonging to the wife is claimable by her out of the property of the husband, in case of the insufficiency of the goods of the community. By section 1470, on the dissolution of the community, from the mass, each one deducts the price of immovables which have been alienated during the community, and for which compensation has not been made. By section 1471, the shares of the wife take precedence of the husband, and by section 1472 the wife is entitled, in case of insufficiency in the community, to exercise her claims out of the property of the husband. Section 1441 declares that the death of either of the parties works a dissolution of the community, and by section 1453 after the dissolution the wife has the power to accept or renounce it. By section 1493, the

<sup>1</sup> *Acc. Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587. And see *Wood v. Wheeler*, 111 N. C. 231.

So generally, the effect of a marriage contract executed abroad upon land is determined by the *lex rei sitæ*. *Heine v. Mechanics' & Traders' Insurance Co.*, 45 La. Ann. 770, 13 So. 1; *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974. — Ed.

<sup>2</sup> The statement of facts and the dissenting opinion are omitted. — Ed.

wife who renounces has a right to receive the price of the immovables alienated, for which compensation has not been made to her. And by section 1495, she may exercise all actions and previous demands as well against the goods of the community as against the personal goods of her husband.

From this examination of the French law it follows that the property of this plaintiff which came to her during marriage, by succession from her mother, being immovable, still belongs to her; that she could alienate it, as she did, with her husband's consent, that he had the management of it, and had a right to retain the avails of the sale, and keep them during the existence of the community, and had a right to the enjoyment of its emoluments; and that on his death, he having received the price of its alienation, she had a valid claim for that price, first to be paid out of the property of the community, and that failing, out of the property of the husband, and that her claim was entitled to priority of payment.

Such would have been the rights of the parties, if both had continued to reside in France.

Are these rights changed by the circumstance of the husband coming to this country and dying here?

That the price of the wife's immovables thus sold and realized by the husband, constituted a valid debt against him by the laws of France, where this marriage took place, admits of no doubt. Is the debt discharged by the husband's coming to this country?

The rule laid down by Parsons on Contracts, 2 Pars. 110, would seem to answer this suggestion. He says: "It is the general rule, both in England and in this country, that the incidents of marriage and contracts in relation to marriage, as settlement of property and the like, are to be construed by the law of the place where these were made; for any different construction cannot be supposed to carry into effect the intentions and agreements of the parties, or to deal with them justly."

Many cases are cited to sustain the text, and among others, those in our own State, of *Decouche v. Savetier*, 3 John. Ch. 190; *Crosby v. Berger*, 3 Ed. Ch. 538, and *De Barante v. Gott*, 6 Barb. 492. These cases hold that where there is an express contract between the parties, that contract will be enforced, and the rights acquired under it maintained and upheld, though there be a change of domicil. Rights dependent on the nuptial contract are governed by the *lex loci contractus*. There would be no difficulty in this case, therefore, in sustaining the rights and claims of the plaintiff, if the provisions of the Code Napoléon had been embraced in an express contract. Some foreign jurists hold that the law of matrimonial domicil attaches all the rights and incidents of marriage to it *proprio vigore*, and independent of any supposed consent of the parties. 1 Boullenois Obser., 29, pp. 741, 750, 757, 758; Huberus, Lib. 1, tit. 3, De Confl. Leg. § 9.



Others hold that there is in such cases an implied consent of the parties to adopt the law of the matrimonial domicile by way of tacit contract, and then the same rule applies as in cases of express nuptial contracts. Dumoulin was the author, or at least the most distinguished advocate, of this doctrine. Story on Conflict of Laws, § 147. This rule has also been adopted by Boubier, Hertius, Pothier, Merlin, and other distinguished jurists. *Id.* § 148.

Story, after reviewing the opinions of jurists and the decisions having a bearing upon the question, sums up the whole by saying, in section 159, that perhaps the most simple and satisfactory exposition of the subject, or at least that which best harmonizes with the analogies of the common law, is, that in the case of a marriage, where there is no special nuptial contract, and there has been no change of domicile, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property, whenever acquired or wherever situate; but that real or immovable property ought to be left to be judged by the *lex rei sitæ*, as not within the reach of any extraterritorial law. When there is any special nuptial contract between the parties, that will furnish a rule for the case, and, as a matter of contract, ought to be carried into effect everywhere, under the general limitations belonging to all classes of contracts.

In this case a new element is introduced by the removal of the husband from France, and consequently a change of his domicile.

In section 161, Story quotes from Boubier, who lays down the rule in general terms that in relation to the beneficial and pecuniary rights (*les droits utiles et pécuniaires*) of the wife, which result from the matrimonial contract, either express or tacit, the husband has no power by a change of domicile to alter or change them, according to the rule *nemo potest mutare consilium suum in alterius injuriam*, and he insists that this is the opinion of jurists generally. To the same effect that the change of domicile by the husband shall not deprive the wife of any separate interests or separate rights she may have, is the case of *Hartean v. Hartean*, 14 Pick. 181.

And this rule is a reasonable and proper one. As a general rule, the domicile of the wife follows that of the husband, and there is much force in the argument, that in the absence of an express agreement defining the matrimonial rights, the law of the contemplated or any future domicile should govern. But in the case now under consideration, the domicile of the wife has not been changed, and the rights she acquired by the tacit contract made in the matrimonial domicile are not, we think, lost or impaired by the change of the domicile of the husband. Those rights did not mature until the death of the husband. They were postponed till the happening of this event, and then by the law of the matrimonial domicile, by virtue of the tacit contract made between the parties, the right of the wife to a return of all her individual property received by the husband, revives and can be enforced.

We see no reasons of public policy why rights thus secured should not be recognized or enforced, equally as those arising from an express contract.

*The judgment must be affirmed, with costs.*<sup>1</sup>

COMSTOCK, C. J., DENIO, HOYT, and JAMES, JJ., concurred. MASON, J., dissented.

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LA SELLE v. WOOLERY.

SUPREME COURT OF WASHINGTON. 1895, 1896.

[Reported 11 Washington, 337; 14 Washington, 70.]

HOYT, C. J.<sup>2</sup> Appellant, William F. Collins, in a suit brought in King County against the respondent, William La Selle, duly recovered judgment. To this action and judgment the respondent, Marian E. La Selle, wife of said William La Selle, was not a party. Execution issued on said judgment, which was placed in the hands of J. H. Woolery, sheriff of King County, the other appellant. He made a levy upon a piece of real estate situated in King County, of which the paper title was in the name of said Marian E. La Selle. This suit was then brought by the respondents, and thereby they sought to enjoin the sale of the property levied upon, and to have it decreed that such property was not subject to the lien of the judgment.

It was conceded that the property, though standing in the name of the wife, Marian E. La Selle, was the community property of herself and her husband, William La Selle. It was, therefore, under the rule established by numerous decisions of this court, subject to the lien of the judgment against the husband alone if the debt upon which such judgment was rendered was that of the community. It is equally well established by the adjudications of this court that such property was not subject to the lien of such judgment if the debt for which it was rendered was the separate debt of the husband. It must follow that the nature of the debt which was the foundation of the judgment is the material question to be determined upon this appeal. If it was that of the community, the sheriff should have been allowed to proceed to satisfy the judgment by a sale of the property. If it was the debt of the husband alone, the appellants were rightfully restrained from proceeding further against the property in question. The foundation of this judgment was one against the husband alone, made and entered in the State of Wisconsin, and the foundation of that one was a liability incurred by the husband to the appellant Collins in the prosecution of his business as a contractor and builder and proprietor of a sash and door factory, and was for materials sold to him to be used in the con-

<sup>1</sup> Acc. Kendall v. Coons, 1 Bush. 530; Columbia Bank v. Walker, 14 Lea, 299. — Ed.

<sup>2</sup> Part of the opinion is omitted. — Ed.

struction of houses and to supply his factory. At the time this liability was incurred, and the judgment in Wisconsin rendered, the respondents were living together as husband and wife in the State of Wisconsin. Afterward they removed from said State, and, from a time preceding the date of the judgment rendered in King County, had been living together as husband and wife in this State. . . .

The substantial question presented by the facts is as to the status of the debt which was the foundation of the judgment in Wisconsin in reference to the property of the husband or husband and wife situated in that State. It appears from the statutes set out in the answer that in that State there is no such thing as community property as understood here, nor is there any such thing as separate property of the husband as defined by our laws. The wife alone could own separate property, and the provisions in relation to its acquisition were substantially the same as in this State. All other property was that of the husband, whether it was acquired in such a manner as to make it under our laws his separate property or that of the community. And all of his property under the laws of that State could be subjected to the payment of debts incurred by him alone. It will be seen from these provisions that a debt incurred by the husband could there be enforced against all of the property acquired by the husband and wife either before or after marriage excepting such as under the laws of that State would be the separate property of the wife. This is substantially the result of the laws of this State as interpreted by former decisions of this court.

In our opinion the comity which one State owes to another goes to the substance rather than the form of things. If a certain right is given in one State as to property of a certain nature, comity would require that those rights should be enforced in another State as to property of the same nature though it might be called by a different name. In the State of Wisconsin property which was acquired by the joint labors of the husband and wife, though called the property of the husband, was subject to the payment of debts incurred by the husband in the prosecution of business for the support of the family. Property acquired in the same manner in this State belongs to the community, but is subject to a liability incurred by the husband alone in the prosecution of business for the same object. Hence, under the rule above suggested, comity requires that a debt which under the laws of that State could be enforced against property which from the nature of its acquisition would be that of the community in this State, should be here enforced against property belonging to the community.

There is nothing in the policy of our legislation which will prevent the application of the rule above stated to the facts of this case. On the contrary, the general policy of this State upon the question of the liability of property of the community and of the respective spouses for debts incurred by the husband alone in the prosecution of any business is in substantially the same line as that of the State of Wisconsin. But whether it is or not, so long as the rights of the parties are adjudi-

cated under the laws of this State, its citizens have no ground of complaint, whatever may be the result as to those of other States. And since what we have said has been founded upon our statute, and the rights adjudicated thereunder have been in the light of the facts shown by the record, the respondents cannot complain.

The judgment will be reversed, and the cause remanded with instructions to overrule the demurrer to the affirmative defences pleaded in the amended answer.

Rehearing granted.

GORDON, J. A majority of the court are of the opinion that a wrong conclusion was reached at the former hearing.

The case is fully stated in the former opinion, in the course of which opinion the court said: "If a certain right is given in one State as to property of a certain nature, comity would require that those rights should be enforced in another State as to property of the same nature."

Upon further consideration, we think that this is extending the doctrine of comity too far. While comity might require that rights so acquired, against personal property merely, should be enforced in this State as against such property (*Harrison v. Sterry*, 5 Cranch, 289; Wharton, *Conflict of Laws*, § 324), we do not think it ought to be extended to property subsequently acquired in this State, although of the "same nature," and this principle is wholly inapplicable to real property. The law of the place where the real property is situated must be held to control its disposition, whether by voluntary or forced sale. *McCormick v. Sullivan*, 10 Wheat. 192.

Upon this subject no less a writer than Story has said: "All the authorities in both countries [England and America], so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate." Story, *Conflict of Laws*, § 428. "Any title or interest in land or in other real estate can only be acquired or lost agreeably to the law of the place where the same is situate." *Id.* § 365.

The character of the property, as regards the question of its being the separate property of either of the spouses, or the property of the community consisting of both spouses or otherwise, is fixed by the law of the State where such property, if real property, is situated. So, too, the character of the debt is determined by the law of the place where it arose. If by the law of Wisconsin it was the sole individual debt of the husband, it retained that character here. Its status was fixed by the law of the place of its creation. The debt which the appellants are here seeking to enforce, being by the law of Wisconsin where it arose merely the separate individual debt of the husband, enforceable only against his separate individual property, it follows that the judgment rendered upon that debt cannot be satisfied out of

the real property of the community acquired in this State long after the debt arose and judgment was rendered upon it.

The doctrine of the common law is that: "In regard to the merits and rights involved in actions, the law of the place where they originated is to govern. . . . But the form of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act." Story, *Conflict of Laws* (8th ed.), § 558.

The settled rule is that the law of the place where the contract was made must govern in determining the character, construction, and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to "the nature, extent, and form of the remedy, . . . whether arrest of the person or attachment of the property may be allowed; whether a debt is or is not discharged by operation of law, as insolvent laws, or barred by statutes of limitation; rights of set-off; the admissibility and effect of evidence; the modes of proceeding and the forms of judgment and execution." 2 *Abbott's Law Dictionary*, p. 36.

In the case of *Blanchard v. Russell*, 13 Mass. 1 (7 Am. Dec. 106), the Supreme Court of Massachusetts, speaking by Chief Justice Parker, say: —

"But the courtesy, comity, or mutual convenience of nations, among which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts; so that is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the State in which they are made, unless from their tenor it is perceived that they were entered into with a view to the laws of some other State. . . . The rule does not apply, however, to the process by which a creditor shall attempt to enforce his demand in the courts of a State other than that in which the contract was made. For the remedy must be pursuant to the laws of the State where it is sought; otherwise great irregularity and confusion would be introduced into the form of judicial proceedings."

The rule has long been established in this court that the community real property is not liable for the separate or individual debt of the husband. *Brotton v. Langert*, 1 Wash. 73 (23 Pac. 688); *Stockand v. Bartlett*, 4 Wash. 730 (31 Pac. 24). And it would be productive merely of confusion and disorder to limit the application of this rule to those debts only which are contracted within this State.

One result of such limitation would be that the court would be required in every case to resort to the law of the State where the debt arose in order to determine what property in that State would be liable for such debt, and then to permit such judgment creditor to have his judgment satisfied out of like property of the judgment debtor in this State, without regard to our own law upon the subject. And it would follow logically from such a rule that property of a judgment

debtor which is by our law exempt from levy and sale on execution could be subjected to the payment of a judgment for a debt incurred in some sister State where the exemption laws were different from our own. All these questions relate to the character and extent of the remedy, and not to the construction or validity of the contract, and they are governed and controlled by the *lex fori*, and not by the *lex loci contractus*; and to avoid interminable confusion the distinction must be observed.

For these reasons the order and judgment of the Superior Court will be affirmed.

SCOTT, DUNBAR, and ANDERS, JJ., concur.

HOYT, C. J. (*dissenting*). The results which will flow from the rule announced in the foregoing opinion are such as to satisfy me that it cannot be the one required by comity. A husband residing in a sister State, possessed of ever so much property which, though the title is vested in him, is held for the benefit of himself and wife, and would from the manner of its acquisition be here held to be community property, and was there subject to debts for the benefit of the family, which would here be held to be community debts, can escape the payment of all the debts which may have been contracted on the faith of the property which he owned by converting such property into cash and removing to this State and investing it in real estate. That the laws of one State should be so construed as to allow a debtor in another, possessed of abundant means with which to pay all of his creditors, to evade the payment of just debts in this way, does not correspond with my ideas of comity. In my opinion the conclusion reached upon the former hearing was the correct one and should be adhered to.

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### ANONYMOUS.

COURT OF APPEAL, WIESBADEN. 1841.

[Reported 1 *Seuffert's Archiv*, 57.]

THE COURT. The opinion adopted in the lower court, that the established rights of inheritance of the spouses are to be determined not by the law of their domicile at the time of the ceremony of marriage, but by the law of their domicile at the time of the death of the husband, is not in accordance with the principles hitherto established in practice; and furthermore the established doctrine rather holds that the division of property and rights of inheritance of the spouses, since the choice of domicile depends entirely on the husband, and since the rights founded upon the tacit agreement connected with entrance into the marriage cannot be annulled or limited by the one-sided act of one of the spouses, particularly by change of domicile, should be regulated only by the law of

the domicile at the time of the marriage celebration. *Juristische Zeitung* for Hanover, 1843, Part II. p. 72. So decided by the Court of Appeal, Munich, Nov. 3, 1847; *Blätter für Rechtsanwendung*, Vol. II. p. 92.

It is of no importance that part of the immovable estate is in a country or district by the law of which the rights of the surviving spouse with respect to the children is settled otherwise. The effect of the above rule extends to immovables situated abroad. This is subject to an exception, however, in a case where at the place where they are situated definite prescriptions are established with reference to the inheritance: that it shall pass to absolutely no other heir than the one therein appointed, and an alteration of this provision by consensual agreement is forbidden.

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SAMUEL v. ARROUARD.

CIVIL TRIBUNAL OF VERSAILLES. 1893.

[*Reported 21 Clunet, 544.*]

THE TRIBUNAL.<sup>1</sup> The documents produced, which are not disputed, prove that Dame Girard-Kiener and her husband were of Swiss nationality at the time of her decease at Chalon, Nov. 15, 1874. They were married at Lausanne on April 16, 1834, without any preceding marriage contract; and consequently, by the terms of the legislation of the Canton of Vaud (Art. 1085), the matrimonial régime to which they were subject was without community of goods. After having lived for some time at Lausanne the Girard-Kieners went to live at Chalon in the year 1848, and Dame Girard died there on Nov. 15, 1874. At no period of their common life did either of the spouses show an intention of changing nationality. No matrimonial capital was furnished by either of them, and in the course of the marriage neither of them received property by inheritance or by gift. Under these circumstances, and in conformity with Art. 1395 of the Civil Code and Art. 1046 of the Code of Vaud (which both provide that a matrimonial régime once adopted shall not change), the plaintiff claims that the regulation of the succession of Dame Girard and of their common property is governed not by the provisions of the French Civil Code, but by those of the laws of Vaud, at least such as expressly provide for the case.

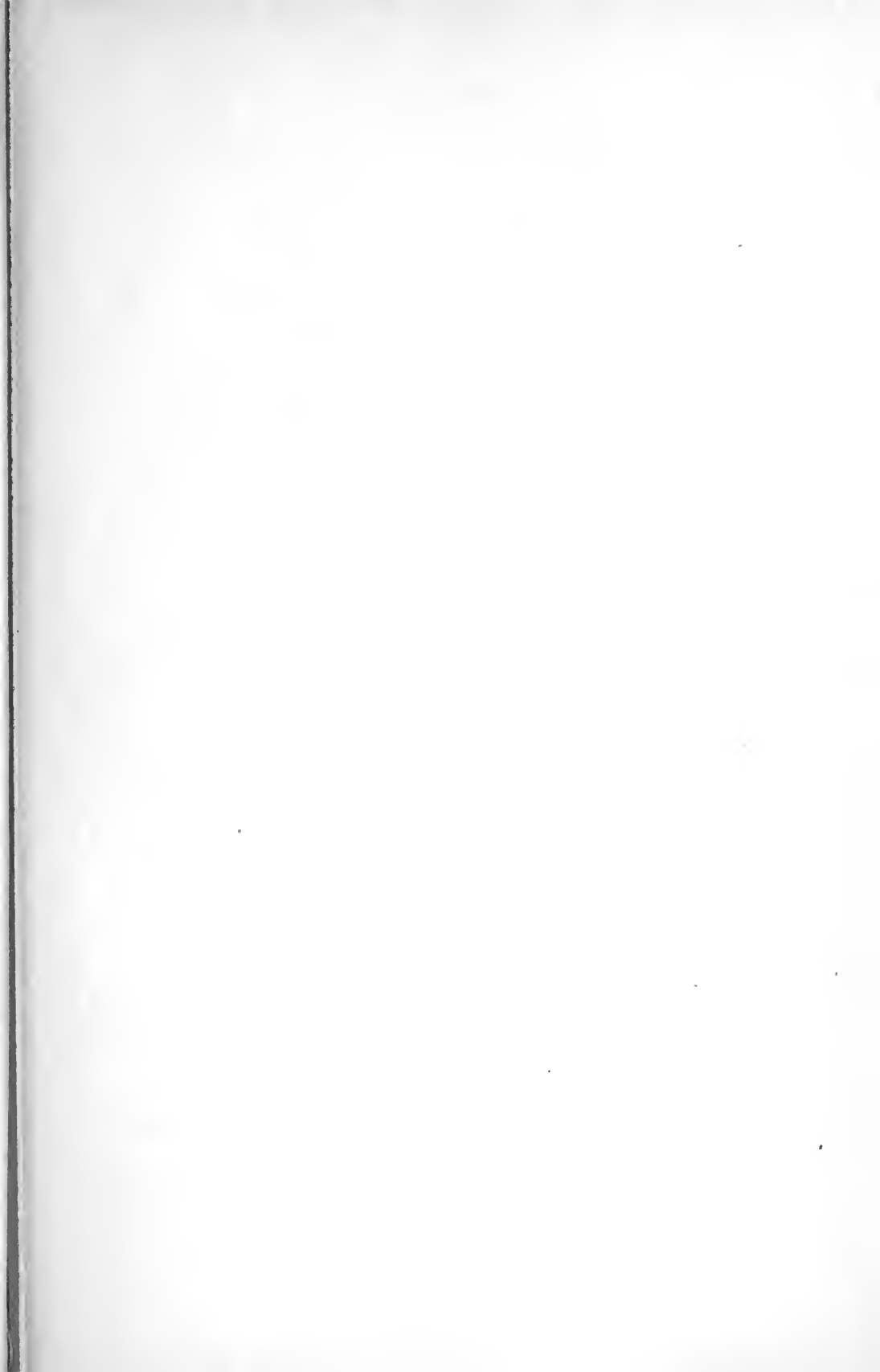
It is quite evident that the régime without community of goods, as it is practised in the Canton of Vaud, is in no way incompatible with the provisions of the French Law, which equally permits the régime without community of goods, or that of separation of goods. Consequently the administration and distribution of the common property of the Girard-Kieners, which took place on May 13, 1875, under the direction of Deguingaud, Notary at Chalon, between Girard and his two children,

<sup>1</sup> Part of the opinion is omitted. — Ed.

may justly be attacked by Girard, since they were erroneously carried out upon the basis of the French legal community, when they should have been regulated by the law of Vaud. . . .

The defendants claim that in any case the immovable property situated at Chalon, the title of which is in the name of Girard, ought in the settlement of the marital property, in conformity with Art. 3, § 2, of the Civil Code, to be governed by the French law rather than by foreign legislation, and, consequently, to be divided upon the basis of the legal community. But since it has been decided by an unbroken line of cases that agreements which have nothing contrary to French law, to public order, and to good morals, should be executed with regard to movables and immovables alike, and since the provisions of a foreign law excluding from matrimonial community immovable property acquired by the spouses during the marriage is in no way opposed to the general provisions of the French law, which permits the régime without community of goods, no distinction can be made by reason of the nature of the property acquired by the spouses during their marriage. . . .





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